

***United States Court of Appeals
for the Second Circuit***



APPENDIX

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WITH PROOF
OF SERVICE

77-50002

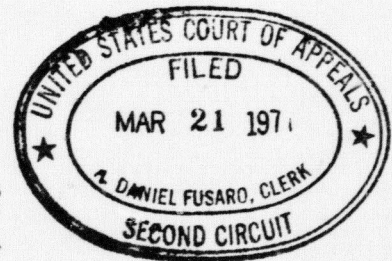
UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

In Re:

W. T. GRANT COMPANY,
Bankrupt.



PAUL S. BERGER, Trustee, and RONALD M. LEE and
SUTRO MORTGAGE INVESTMENT TRUST, individually
and on behalf of all others similarly situated,

Plaintiffs-Appellants,

- against -

CHARLES G. RODMAN, Trustee in Bankruptcy of W. T.
GRANT COMPANY, Bankrupt,

Defendant-Appellee.

On Appeal From a Memorandum Opinion and Order of the
United States District Court for the Southern District of New York

APPENDIX

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(6128A)

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DOCKET ENTRIES

NAME OF BANKRUPT/DEBTOR W.T. GRANT COMPANY		DIST. NO. 238	DIV. NO.	DOCKET NO. 75 B 1735
First Middle		CHAPTER OR SECTION XI-322		CHECK IF ☒ Voluntary
DATE PETITION FILED 10/2/75		DATE CLOSED		☒ Involuntary
ADDRESS OF BANKRUPT/DEBTOR (Number and Street) 1015 Broadway		DATE DISCHARGED		☒ Fee and in arrears
CITY New York		STATE N.Y.		☒ Corporation
ZONE New York		COUNTY New York		☒ Farmer
NAME OF DISTRICT JUDGE		NAME OF BANKRUPTCY JUDGE John J. Calvey		☒ Employee
ATTORNEY FOR BANKRUPT OR DEBTOR		ATTORNEY FOR PETITIONING CREDITORS		☒ Professional
RECEIVER		TRUSTEE		☒ Other (Non-business)
ATTORNEY FOR RECEIVER		ATTORNEY FOR TRUSTEE		☒ Merchant
CHANGES OF PRINCIPALS		PROCEEDINGS		☒ Manufacturer
DATE		10/2/75		☒ Other (Business)
10/3/75		10/7/75		☒ CHAPTER UNDER WHICH CASE WAS PREVIOUSLY DISMISSED
10/8/75		10/21/75		

FILED
FEB 22 1977
DANIEL FUSARO, CLERK
SECOND CIRCUIT

Filed Petition under Chapter XI-322 proceedings, List of Creditors, Affidavit under Rule 28-2. Referred to Bankruptcy Judge Calvey.

Filed NOTICE OF MOTION, of Bader and Bader to move the court for an order in adjudicate W.T. Grant from its present Chapter XI-322 to Chapter X-28. RET: 10/21/75 at 10:30 A.M. in room 506. f.

Filed Statement under Section 210 of the Bankruptcy Act. Copy to Bank. Judge.

Filed Order to Show Cause, why an order shall not be entered herein dismissing, for the lack of jurisdiction on the part of the District Judges of the USDJ. RET: October 10, 1975 at 2:0 P.M. in room 506. So ordered Cannella, I. dated 10/8/75 f. OVER

FORM BK 74-B
AUG. 1974

BANKRUPTCY DOCKET—COPY

CHECK THIS BOX IF FILING FEES WERE PAID IN FULL AT THE TIME OF FILING
Continued on **Next Page**

BEST COPY AVAILABLE

- 10/8/75 Filed Debtors' Memorandum of Law in support of Motion to Transfer Chapter XI proceedings to Chapter X and appoint a receiver. Sub By: Wachtell, Lipton, Rosen & Katz. f/
- 10/10/75 Filed MEMORANDUM DECISION AND ORDER, #43240, the motion to convert the Chapter XI proceedings into Chapter X and/or to appoint a receiver is dismissed without prejudice as jurisdictionally defective. So ordered Cannella, dated 10/10/75 (Copy to Bank Judge) WACHTELL LIPTON ROSEN & KATZ, 299 Park Avenue, New York, N.Y. 10021.
- 10/14/75 Filed NOTICE OF APPEAL to the USCA by the Independent Investor Protective League and Morris L. Levy, from an order made by Hon. Judge Cannella dated 10/10/75 dismissing the proceedings brought by the petitioners to transfer this bankruptcy from Chapter XI to Chapter X of the Bankruptcy Act. Mailed Notices.
- 10/22/75 Filed Affirmation in Opposition to order to Show Cause to dismiss motion for appointment of receiver or to transfer proceedings to Chapter X of the Bankruptcy Act. Sub By: I. Walton EADER.
- 12/29/75 Filed NOTICE OF APPEAL to the USDC from the of John J. Galgay, Bank Judge dated 11/17/75, by N.Y. Telephone Co. RET. 2/10/75, at 1:30 A.M. in room 506. f.
- 12/29/75 Filed Designation of Contents for inclusion in the record on appeal and statement of the issues to be presented on appeal, f.
- 12/31/75 Filed NOTICE OF APPEAL to USDC by Baltimore Gas and Electric, from the Order of Bank Judge Galgay, dated 11/17/75. RET: 2/10/76 at 10:30 A.M. in room 506. f.
- 12/31/75 Filed Designation of Contents of record on appeal and statement of issues. f.
- 1/6/76 Filed transcripts of testimony dated 10/10/75.
- 1/6/76 Filed BRIEF OF HALL-TATE MFG. CO., in opposition to order to Show Cause of W.T. Grant Co., Debtor-in-Possession. f.
- 1/6/76 Filed AFFIRMATION IN OPPOSITION, of Roy E. Pomerantz. f.
- 1/8/76 Filed BRIEF OF BALTIMORE GAS AND ELECTRIC CO., on appeal from order of Bankruptcy Judge limiting deposit for continued service. f.
- 1/12/76 Filed ORDER that the said application be and the same hereby is granted to the extent that the lease to the premises be and the same hereby is rejected and disaffirmed as at 12/9/75 etc. So Ordered Galgay, Bank. Judge dated 12/22/75. f.
- 1/15/76 Filed Stipulation and Order that the hearing on the appeal is adjourned to 3/23/76. So ordered Bonsal, J. dated 1/13/76. f.
- 1/21/76 Filed STIPULATION & ORDER, extending time to serve and file its brief till 1/27/76. etc. So ordered Metzner, J. dated 1/19/76.
- 1/27/76 Filed MEMORANDUM of Respondent-Appellee W.T. GRANT COMPANY. (RE: Baltimore Gas and Electric Co.) f.
- 2/4/76 Filed REPLY BRIEF OF BALTIMORE GAS AND ELECTRIC CO. PETITIONER-APPELLANT. By LeBoeuf, Leiby & MacRae. f.

CONTINUED ON PAGE 3.

DATE	PROCEEDINGS	LOCKET NUMBER
2/20/76	Filed ORDER OF DISCONTINUANCE, So ordered Motley, J. dated 2/20/76. Copy to Bank Judge. (Baltimore Gas)	
2/20/76	Filed ORDER that the order of Judge Galgay of 11/17/76 is affirmed. So ordered Motley, J. dated 2/20/76. (Baltimore Gas) Copy to Bank Judge.	
2/20/76	Filed OPINION # 43920, order appealed from is affirmed in all respects. So ordered Motley, J. dated 2/20/76. (Copy to Bank Judge). (Baltimore Gas) M/N; Wachtel Lipton Rosen & Katz, 299 Park Ave, N.Y.N.Y. 10017 LeBoeuf Lamb Leiby & Mac Rae & Judge Galgay, 40 Center Street, N.Y.N.Y.	
3/3/76	Filed Notice of Appeal to District court by ZARTLEG DEVELOPMENT CORP., From order of Bkcy. Judge on 12/31/75, Ret: 4/13/76 at 10:30 AM in Rm. 506. (Cinnaminson Shopping Center, Inc. f.	
3/3/76	Filed Notice of Appeal to District court by ZARTLEG DEVELOPMENT CORP., From order of Bkcy. Judge on 12/31/75, Ret: 4/13/76 at 10:30 AM in Rm. 506. (Woodcrest Homes, Inc.) f.	
3/3/76	Filed Designation of contents for Inclusion in the Record on Appeal & Statement of Issues. f.	
3/3/76	Filed Counterdesignation of Issue Presented On Appeal. f.	
3/3/76	Filed Notice of Appeal to USCA by BALTIMORE GAS & ELECTRIC CO., from opinion of Motley J. dated 2/20/76. m/n. f.	
3/8/76	Filed Consolidated Designation of Contents of Record on Appeal.	
3/15/76	Filed ORDER adjourning the appeal to 5/25/76. So ordered Pollack, J. dated 3.9.76, f.	
3/16/76	Filed ORDER adjourning the appeal to 5/4/76. So ordered, Griesa, J. dated 3/16/76. f.	
3/22/76	Filed NOTICE OF APPEAL to the District Court by Zartleg, from the order of Bankruptcy Judge dated 3/1/76. RET: 5/4/76 in room 506 at 10:30 A.M. f.	
3/22/76	Filed Designation of Contents for Inclusion in the record on appeal and Statement of Issues. f.	
3/22/76	Filed REQUEST TO CLERK TO Certify and Transmit Record.	
3/31/76	Filed BRIEF of Appellant Zartleg Development Corp. f.	
4/7/76	Filed STIPULATION withdrawing appeal to the USCA, True Copy Signed, A. Daniel Fusaro.	
4/9/76	Filed NOTICE of Original record being transferred to the USCA.	

FORM BK 74-E
SEPT. 1972

Continued on page 4

UNITED STATES DISTRICT COURT

BANKRUPTCY DOCKET--CONTINUATION

DATE	PROCEEDINGS
4/15/76	Filed BRIEF Submitted on behalf of the Channel Companies, Inc. by Parker, Chapin & Flattau. f.
4/16/76	Filed BRIEF of Trustee in Opposition To Appeal by Zartleg Development Corp. f.
4/7/76	Filed STIPULATION WITHDRAWING THE APPEAL TO THE USCA, True Copy, Fusaro, Clerk, M/N: BADER & BADER, 270 Madison Ave, N.Y.N.Y., Wachtel Lipton Rosen & Katz, 299 Park Ave New York, N.Y. & Whitman & Ransom 522 Fifth Ave, N.Y.N.Y.
4/20/76	Filed ORDER (copy) directing funds to be deposited in the District Court's Account. So ordered Galgay, Bkcy J. dated 4/9/76.
4/23/76	Filed REPLY BRIEF of Appellant Zartleg Development Corp. f.
4/30/76	Filed Notice of Motion to dismiss order to Show Cause. Ret: 4/29/76 at 11:30A.M. in room 234. f.
4/30/76	Filed MEMO-ENDORSED on back of Notice of Motion to dismiss order to Show Cause. Motion denied following argument. so ordered Mac Mahon, J. dated 4/29/76. (Copy to Bank Judge)
5/3/76	Filed NOTICE OF APPEAL, to the USCA by PHOENIX MUTUAL INSURANCE CO., from the order of District Judge Mac Mahon, dated 4/29/76. M/N: f.
5/13/76	Filed NOTICE OF APPEAL to the USDC by Frances Swinick from an order of Galgay, J. Bkcy. RET: 6/29/76 at 10:30 AM in room 506. f.
5/13/76	Filed Contents and Statement of Issues on Appeal. f.
5/17/76	Filed ORDER affirming the District Court's decision. (Zartleg). So ordered Wyatt, J. dated 5/17/76. Copy to Bank Judge. M/N: Wachtel Lipton Rosen & Katz 299 Park Avenue, N.Y.N.Y., Weil Gotshal & Manges 767 Fifth Ave N.Y.N.Y., Taenzler & Friedman At. 130 & Riverton Rd. Cinnaminson, N.J. 08077, Zissa Lore Halper & Robson 450 Park Ave, N.Y.N.Y., Ballou Still & Itzler 1180 Ave of the Amer. N.Y.N.Y. & Parker Chapin & Flattau 530 Fifth Ave. N.Y.N.Y.
6/3/76	Filed ORDER TO SHOW CAUSE why an order granting relief in the Nature of Mandamus should not be entered. RET: 6/8/76 at 10:15 AM in room 506. f.
6/3/76	Filed AFFIDAVIT of Jon Moss in support of motion for relief in the nature of Mandamus. f.
6/3/76	Filed NOTICE OF APPEAL to the USCA from the Memorandum Decision and Order of the District Court Wyatt, J., dated 5/17/76, by Zartleg Development Corp. M/N: f.
5/28/76	Filed ORDER (True Copy) that said petition be and it hereby denied. Signed A. D. Fusaro, Clerk. M/N: Hahn Hessen Margolis & Ryan., 350 Fifth Ave., N.Y.N.Y.

Continued on page 5

101 M-1-10 70-750-5149

DATE	PROCEEDINGS
	Michael Landers, US Att'y One St. Andrews Plaza N.Y.N.Y. 10007, T. Gewertz, Wachtell Lipton Rosen 299 Park Ave, Hon. Lloyd F. MacMahon, 40 Foley Sq, N.Y.N.Y. & Hon J.J. Galgay 40 Foley Sq. N.Y.N.Y. 10007.
6/4/76	Filed ORDER (true copy) of USCA, that the Appeal from the order of the District Court is hereby dismissed. Signed A. Daniel Fusaro--Clerk. 5/27/76 m/n Wachtell, Lipton, Rosen & Katz, Esqs. 299 Park Ave. NYC Zissu, Lore Halper & Robson, Esqs. 450 Park Ave. NYC Hahn, Hessen, Margolis & Ryan 350 Fifth Ave. NYC
6/7/76	Filed STIPULATION & ORDER that the appeal to the USDC by the N.Y. Telephone Co., is withdrawn. So ordered. Briant, J. dated 6/4/76. M/n: George E. Ashley 1095 Ave of the Americas, N.Y.N.Y. 10036, Wachtell Lipton, Rosen & Katz, 299 Park Ave, N.Y.N.Y. 10017 & Judge Galgay 40 Foley Sq. N.Y.N.Y. 10007. Copy to Bank Judge
6/21/76	Filed NOTICE OF APPEAL to the USDC by Liebman Eulau, Robinson & Perlman, from orders dated 11/14/75 & 5/13/76. RET: 8/3/76 at 10:30 AM in room 506. f.
6/21/76	Filed Designation of items to be included in record on appeal and Statement of Issues. f.
7/6/76	Filed MEMO ENDORSED on back of the Notice of Appeal. The order of Bankruptcy Judge Galgay is Affirmed. So ordered Knapp, J. dated 7/1/76. Copy to Bank Judge. M/N: FRANCES SWINICK, 3 High St., New Brunswick, New Jersey, 08901, Wachtell Lipton Rosen & Katz, 299 Park Ave, N.Y.N.Y. 10017 & Judge Galgay, 40 Foley Sq N.Y.N.Y.
7/7/76	Filed ORDER extending time for appellant, Liebman Eulau etc., to serve and file its appellant's brief. So ordered Ward, K. dated 7/6/76. f.
7/8/76	Filed BRIEF FOR APPELLANT, Special Counsel for debtor in possession. Sub By: Liebman Eulau Robinson & Perlman. f.
7/9/76	Filed ORDER TO SHOW CAUSE why Appeal should not be dismissed, or alternatively, why Appeal should not be expedited. Ret: 7/13/76 at 10:30 A.M. Room 506. So Ordered Ward, J. Dated 7/8/76 f.
7/12/76	Filed NOTICE OF APPEAL to USDC by McLeod Stedman Ltd. from the order of Bkcy. Judge Galgay. Dated: 6/22/76 Ret: 8/24/76 at 10:30 Room 506. f.
7/12/76	Filed Designation of contents of Record on Appeal and Statement of Issues Presented. f.
7/9/76	Filed NOTICE of Original Record being transferred to the USCA.

CONTINUED ON PAGE 6

DATE	PROCEEDINGS
7/13/76	Filed Affidavit of Donald S. Rogers in opposition to trustee's motion to dismiss or expedite this appeal. f.
7/13/76	Filed MEMORANDUM of Morgan Guaranty Trust Co., in support of Trustee's Motion regarding the appeal from the order of the Bankruptcy Court entered 6/22/76 authorizing the sale of Zeller's Securities. Sub By: Davis POLK & WARDWELL. f.
7/13/76	Filed Trustee's Memorandum in support of Motion to dismiss appeal Sub By: Weil Gotshal & Manges. f.
7/19/76	Filed STIPULATION suggesting withdrawal or unconditional offer etc. So ordered Ward, J. dated 7/16/76. f.
7/16/76	Filed NOTICE OF APPEAL to the USCA by Frances Swinick from the order by Judge Knapp. M/N f.
7/23/76	Filed MEMO ENDORSED on back of Order to show Cause dated 7/9/76. Motion withdrawn as moot. So ordered Ward, J. dated 7/22/76. Copy sent to Bkcy. Judge.
7/22/76	Filed Notice of Withdrawal of Appeal (Maxleod Stedman Ltd) Granted. So ordered Ward, J. dated 7/22/76. Copy to Bank Judge. M/N; Weil Gotshal & Manges, 767 5th Ave, NYC, Webster & Sheffield 1 Rockefeller Plaza, NYC. 10020, Hahn Hessen Margolis & Ryan, 350 5th Ave, NYC, Popper & Popper 350 5th Ave, NYC, Trubin Sillcocks, Edelman & Knapp, 375 Park Ave, NYC, Davis Polk & Wardwell 1 Chase Manhattan Plaza NYC. & Debevoise Plimpton Lyons & Gates, 299 Park Ave, NYC.
7/23/76	Filed transcript of testimony dated 7/13/76.
7/30/76	Filed Answer and Affidavit in opposition to Mandamus Petition, of Theofore Gewertz.
7/30/76	Filed MEMO-ENDORSED on back of Affidavit filed 6/3/76. Petitioners' request that this court order Bankruptcy Judge Galgay to rule on a motion to dismiss their complaint is denied. so ordered Gagliardi, J. dated 7/29/76.
7/30/76	Filed NOTICE OF APPEAL, to the USDC by Barbara Lynn of Forest Avenue, Inc. and Majors Discount Stores, Inc., from the order of the Bankruptcy Court dated 5/20/76. RET: 9/14/76 at 10:30AM in room. f.
7/30/76	Filed Designation of Contents of Record on appeal and Statement of issues. f.
7/30/76	Filed STIPULATION & ORDER extending time for filing of Brief of Appellee and Adjourning hearing on appeal. Adjourning the appeal to 9/21/76. So ordered Conner, J. dated 9/21/76. f.

CONTINUED ON PAGE 7

DOCKET NUMBER

DATE	PROCEEDINGS
8/10/76	Filed True Copy of an order of the USCA (Baltimore Gas) dismissing the appeal as moot. Clerk of USCA 7/16/76. M/N; LE BOEUF LAMB LEIBY & MACRAE, 140 B'way & Wachtell Lipton Rosen & Katz, 299 Park Avenue, New York, N.Y. Copy to Bank Judge.
8/12/76	Filed ORDER TO SHOW CAUSE why the order of the Bankruptcy Court herein dated 8/5/76 should not be stayed and temporary stay. So ordered Goettel, J. dated 8/12/76. RET: 8/16/76 at 11:00 AM in room 506. f.
8/26/76	Filed MEMORANDUM OF LAW Sub By: Krause Hirsch & Gross.
8/26/76	Filed MEMO-ENDORSED on back of order to show cause dated 8/12/76. The order of the Bankruptcy Court of 8/5/76 is stayed pending determination of this motion. So ordered Goettel, J. dated 8/12/76.
8/31/76	Filed NOTICE OF MOTION for an order dismissing plaintiff's appeal from the order of the Bankruptcy Court dated 7/26/76. RET: 9/14/76 at 10:30 AM in room 506. f.
8/31/76	Filed MEMORANDUM in support of defendant-appellee's motion to dismiss appeal. Sub By Wachtell Lipton etc. f.
9/1/76	Filed NOTICE OF APPEAL to the USDC by Union River Co. from the order of the Bankruptcy Judge dated 8/5/76. RET: 10/19/76 at 10:30 AM in room 506. f.
9/1/76	Filed Designation of Record on Appeal. f.
9/1/76	Filed BRIEF on behalf of Plaintiff-Appellant. Sub By: Siff & Newman. f.
9/8/76	Filed AFFIDAVIT of Jon Moss in opposition to motion to dismiss appeal. f.
9/14/76	Filed REPLY AFFIDAVIT of Jon Moss, in opposition to the Trustee's motion to dismiss. f.
9/14/76	Filed copy of General Restraining Order So ordered. Galgay, J. dated 10/31/75.
9/15/76	Filed COUNTER-DESIGNATION of Contents of Record on appeal and Statement of Issue presented. f.
9/20/76	Filed STIPULATION & ORDER adjourning the appeal of Liebman Eulau Robinson & Perlman to 9/28/76 at 10:30 AM in room 506. f. So ordered Duffy, J. dated 9/20/76. f.
9/23/76	Filed MEMORANDUM OF LAW, (Union River Company) Sub by: Krause Hirsch & Gross. f.
9/27/76	Filed REPLY BRIEF on behalf of Plaintiff-Appellant. Sub By: Siff & Newman, P.C.
9/30/76	Filed ORDER of Judge Galgay--ORDERED that the leases by and between N.Y. Life and Grant and parties identified in Schedule #1 annexed, with respect to each of the premises are terminated and cancelled etc. and further ORDERED that the above is w/o prejudice to the rights of N.Y. Life to file proofs of claim in this proceeding etc....GALGAY.

FORM BK 74-E
SEPT. 1962

CONTINUED ON PAGE 8

UNITED STATES DISTRICT COURT

BANKRUPTCY DOCKET--CONTINUATION

DATE	PROCEEDINGS
9/30/76	Filed MEMORANDUM OF APPELLEE SCHAFFER (Barbara Lynn of Forest Ave, Inc.) Sub By: Levin & Weintraub. f.
9/30/76	Filed ORDER that the appeal (Liebman Eulau Robinson & Peralman) is adjourned from 9/28/76 to 10/5/76. So ordered Palimeri, J. dated 9/28/76. f.
10/4/76	Filed BRIEF OF TRUSTEE-APPELLEE, Sub By Wachtell Lipton Rosen & Katz. (Barbara Lynn) f.
10/4/76	Filed BRIEF FOR APPELLANT, Special Counsel for DIP. Sub By: Liebman Eulau Robinson & Peralman. f. (Copy)
10/4/76	Filed Notice of Supplemental Record being transmitted to the USCA. f.
10/4/76	Filed AFFIDAVIT of Dirk S. Gould, in opposition to defendant's motion to dismiss the appeal from the order of Galgay, J. dated 7/29/76. f.
10/12/76	Filed MEMO-ENDORSED on back of the notice of appeal dated 6/21/76. (Liebman Eulau Robinson & Perlman) The Appeal as dismissed. So ordered Duffy, J. dated 10/12/76. M/N; Charles G. Rodman, 360 West 31 St Street, N.Y.N.Y., Wachtell Lipton Rosen & Katz, 299 Park Ave, New York, N.Y., Weil Gotshal & Manges, 767 Fifth Ave, N.Y.N.Y., Ballon Stoll & Itz'ler 1180 Ave of the Amer, N.Y.N.Y., S.E.C. 26 Fed Plaza, N.Y.N.Y., Popper & Popper 200 Fifth Ave, N.Y.N.Y., Hahn Hessen Margolis & Ryan 350 Fifth Ave, N.Y.N.Y., Debovoise Plimpton, Lyons & Gates, 299 Park Ave, N.Y.N.Y., Liebman Eulau Robinson & Perlman 32 East 57th St., N.Y.N.Y. & Judge Galgay, 40 Center Street, N.Y.N.Y. (Copy to Bank Judge).
10/18/76	Filed MEMORANDUM OF LAW, Sub By: Dreyer and Traub.
10/18/76	Filed MEMO-ENDORSED on back of the Notice of Appeal of Barbara Lynn. The appeal is dismissed for lack of standing. So ordered Duffy, J. dated 10/15/76. Copy to Bank Judge. M/N; Wachtell Lipton Rosen & Katz 299 Park Ave, N.Y.N.Y., Weil Gotshal & Manges, 767 Fifth Ave, N.Y.N.Y., Levin & Weintraub 225 B'way, N.Y.N.Y., Chester Robinson 919 Third Ave, N.Y.N.Y., Dreyer and Traub 90 Park Ave, N.Y.N.Y., Attn: Samuel Kirschenbaum & Judge Galgay 40 City Sq., N.Y.N.Y.
10/18/76	Filed STIPULATION AND ORDER withdrawing Bankruptcy Appeal as to trustee. (S.S. Kresge Co., & Charles G. Rodman) So ordered Duffy, J. dated 10/12/76. Copy to Bank Judge. f.
10/19/76	Filed NOTICE OF APPEAL to the USDC from the order dated 9/14/76 and 10/1/76 by Berger, Lee & Sutro Mortgage Investment Trust. RET: 11/5/76 @10:30 AM in room 506. f.
10/19/76	Filed Designation of Record and Issues on Appeal. f.
10/20/76	Filed CONSENT ORDER (re: Bankruptcy Appeal Berger) placing this appeal on 11/5/76. So ordered Gagliardi, Lee P. J. dated 10/20/76. f.
10/26/76	Filed NOTICE OF MOTION FOR REARGUMENT OF APPEAL, for an order granting reargument of the aforesaid appeal. (Liebman, Eulau et al) RET: 11/9/76 in room 905 at 10:00AM. f.

CONTINUED ON PAGE 9.

DATE	PROCEEDINGS
10/26/76	Filed APPELLANT'S MEMORANDUM OF LAW in support of motion for reargument. Sub By: <u>Liebman, Eulau, etal.</u> f.
10/26/76	Filed APPELLANTS' BRIEF, Sub By: Alter Lefevre Raphael et;
11/3/76	Filed BRIEF of Defendant-Appellee Charles G. Rodman, Trustee, Sub. by Wachtell, Lipton, Rosen & Katz, (Berger) f.
11/3/76	Filed Copy of Stipulation modifying stay of suits as to action by Sharon Lynch, Debbie Lynch, Dianne Kear & Jeanie Kear. So ordered Galga, J. dated 10/15/76.
11/9/76	Filed Appellants Reply Memorandum of Law in support of Motion for Reargument. Sub. by Liebman, Eulau, Robinson & perlman, 32 E. 57th St. N.Y. 10022 f.
11/11/76	Filed true copy of USCA mandate # affirming the order of the Dist. Ct. with bill of costs as taxed in the sum of \$678.87. In favor of CHANNEL COS. INC. also CHARLES G. RODMAN as Trustee in the sum of \$42.40 Docketed as Judgment # 77,046 -Judg: entered 11/12/76-Clerk
11-15-76	Filed Affdvt. of Paul M. Brown. Re: Application to be made at 4:30 P.M. in Room 506.
11-15-76	Filed Order to Show Cause as to why hearing on proposed Settlement and Compromise should not be stayed and restrained pending the hearing and outcome of the appeal. f.
11-15-76	Filed Memo End. on Order to show cause of 11-15-76. Application for a stay is denied in all respects. See Minutes. So Ordered. Cooper J.f. Copy to Bkcy. Judge Babitt.
11-15-76	Filed Certificate to Accompany Bankruptcy's Judges Recommendation on Allowances Pursuant to Rule 16. Ret: 11-23-76 at 10:30 A.M. in Room 506. f.
11/17/76	Filed NOTICE OF APPEAL to the USDC by Gilbert Tilles & Joseph Mascioli (Landlords of Store), from the order and Judgment on 9/9/76. Ret: 12/28/76 at 10:30 AM Room 506. f.
11/17/76	Filed DESIGNATION OF the Contents for Inclusion in Record on Appeal, and Statement of Issues on Appeal. f.
11/23/76	Filed MEMORANDUM OF APPELLEE SCHAFFER. Sub. by Levin & Weintraub 225 Broadway New York, N.Y. 10007
11/29/76	Filed Order Approving Allowances. So ordered Cannella, J. dated 11/23/76. Sent Copy to Bkcy. Judge.
11/29/76	Filed APPELLEE-TRUSTEE'S MEMORANDUM IN OPPOSITION to Motion for Reargument. Sub. by Weil, Gotshal & Manges 767 5th Ave. N.Y. 10022.

- 11/29/76 Filed MEMO-ENDORSED, THE MOTION to reargue is granted. Bkcy. Judge allowed less than the full amount of fees requested by appellant, appellant will have received a more than generous percentage of the fees claimed to have been earned. On reargument, appellant's motion is denied. So ordered Duffy, J. dated 11/26/76.
- 12/3/76 Filed MEMORANDUM OF LAW ON BEHALF OF SCHRODER TRUST CO. Senior Indenture Trustee, in Opposition to Motion by Richard A. Gordon, et al., for Leave to Intervene & to Serve & File an Answer in the above-captioned Adversary proceedings, Sub. By Debevoise, Plimpton, Lyons & Gates 299 Park Ave. N., NY. f.
- 12/7/76 FILED APPELLANTS' BRIEF. Sub. by Rothfeld, Ostrow & Lawrence 479 Merrick Rd. Lynbrook, N.Y. 11563. f.
- 12/10/76 Filed NOTICE OF APPEAL to District Court by Richard A. Gordon & Frank Gordon, from the order of Galgay, J. dated 11/18/76. Ret: 1/25/76 at 10:30 AM in Rm. 506. f.
- 12/10/76 Filed DESIGNATION OF RECORD ON APPEAL. f.
- 12-13-76 Filed Transcript of Record of Proceedings held before Judge Ward dated July 13th, 1976. 3
- 12/15/76 Filed OPINION# 45441 the decision & memorandum opinion of the Bkcy. court dated 8/5/76 is hereby vacated, and the application of Union River is dismissed for lack of jurisdiction. So ordered Gagliardi, J. dated 12/13/76. f. m/n Copy to Bkcy. Judge.
- 12/22/76 Filed MEMORANDUM DISMISSING PLTFF'S. Appeal as untimely. So ordered Cooper, J. dated 12/21/76.
- 12/23/76 Filed ELIZABETH REMINGTON, AFFIDAVIT OF SERVICE by Mail. Affidavits in support of Order to Show Cause, Petition etc.
- 12/23/76 Filed ELIZABETH S. KEAN, AFFIDAVIT OF PERSONAL SERVICE respect to payment of trustee's fees, Petition, Affidavits and Exhibits.
- 12/27/76 Filed NOTICE OF APPEAL to USCA by Liebman, Eulau, Robinson and Perlman, from the order of District Judge Duffy, J. dated 10/12/76 and 11/29/76 m/n f.
- 12/29/76 Filed NOTICE of SUPPLEMENTAL RECORD on Appeal, has been Certified & Transmitted to USCA 12/29/76. 5

DATE	PROCEEDINGS
1/4/77	Filed Irene Kerr, AFFIDAVIT OF SERVICE BY MAIL of Appellants' Brief . . f.
1/5/77	Filed ORDER that the Opinion of 8/5/76 is vacated, for lack of jurisdiction. So ordered Gagliardi, J. dated 1/3/77. Copy to Bkcy. Judge
01-10-77	Filed Stip. that the hearing set for 12-28-76 is adjourned to 02-01-77, and that Respondents atty. have to 01-21-77 to submit their briefs. So Ordered. GRIESA J. Copy sent to Galgay.
1/13/77	Filed NOTICE OF MOTION to Dismiss Appeal from Bkcy. Court's Order of 12/17/76, with AFFIDAVIT in Support of Motion to dismiss appeal. Ret: 1/25/77 at 10:30 in Room 506. . . f.
1/13/77	Filed TRUSTEE'S MEMORANDUM in Support of Motion to Dismiss Appeal. Sub. by Weil, Gotshal & Manges. . . f.
1/15/77	Filed NOTICE OF APPEAL TO USCA by Pltff's. Paul S. Berger, Trustee, & Ronald M. Lee, & Sutro Mortgage Investment Trust, from the Memorandum Opinion & Order of District Judge Cooper, J. dated, 12/21/76. . . f.
1/19/77	Filed UNDERTAKING FOR COSTS ON APPEAL- National Surety Corp.
1/25/77	Filed NOTICE OF SUPPLEMENTAL RECORD on Appeal, has been Certified & Transmitted to USCA ON 1/25/77. (Liebman, Eulau, Robinson & Perlman)
1/26/77	Filed MEMO ENDORSED, The parties hereto shall submit post argument briefs on the issue of the constitutionality of Bkcy. Rule 805 by 2/1/77. Papers shall be submitted to the chambers of the undersigned. Decision Reserved. So ordered Pierce, J. dated 1/25/77. m/nf. Copy to Bkcy. J.
2/2/77	Filed Stipulation & Order, hearing scheduled for 2/1/77 be adjourned on consent subject to the approval of this court to 3/8/77, & to submit briefs on or before 2/25/77. So ordered Pierce, J. dated 1/31/77.
2/8/77	Filed MEMORANDUM in Support of Appeal from order permitting sale of Customer Accounts Receivable. Sub. by Bader & Bader. . . f.

(Cont'd Page 12)

PAGE 12

W.T. GRANT CO.

75 B 1735

2/8/77 Filed TRUSTEE'S POST-HEARING MEMORANDUM in Support of Motion to Dismiss Appeal. Sub.by Weil, Gotshal & Manges. (Gordon) f.

02-08-77 Filed transcript of record of proceedings dated ~~11-12-76~~

2/8/77 Filed MEMO ENDORSED, of the Motion to dismiss the Appeal as moot must be, & hereby is, granted. Appeal Dismissed. So ordered, Pierce, J. dated 2/8/77. m/n Copy to Bkcy. Judge.

2/15/77 Filed NOTICE OF APPEAL to USCA by Richard A. Gordon & Frank Gordon from the Order of District Court Judge Pierce dated 2/8/77. f. m/n

ORDER TO SHOW CAUSE TO EXTEND TIME TO APPEAL
FROM ORDER OF BANKRUPTCY COURT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x

In Re	:	
W. T. GRANT COMPANY,	:	In Bankruptcy
Bankrupt,	:	No. 75 B 1735
PAUL S. BERGER, Trustee, and RONALD M. LEE and SUTRO MORTGAGE INVESTMENT TRUST, individually and on behalf of all others similarly situated,	:	
Plaintiffs-Appellants,	:	ORDER TO
- against -	:	<u>SHOW CAUSE</u>
CHARLES G. RODMAN, Trustee in Bankruptcy of W. T. GRANT COMPANY, Bankrupt,	:	
Defendant-Appellee.	:	

-----x

Upon the annexed affidavit of DIRK S. GOULD sworn to September 7, 1976, the exhibits thereto, the complaint in this proceeding and upon all the papers in the proceeding heretofore had herein and sufficient cause appearing therefore,

NOW, upon application of Alter, Lefevre, Raphael, Lowry & Gould, P.C., one of the attorneys for plaintiffs, it is

ORDERED, that defendant-appellee show cause before the Honorable John J. Galgay, Bankruptcy Judge of this Court, in Room 234 of this Courthouse, Foley Square, New York, New York, on the 13th day of September, 1976, at ten o'clock

in the forenoon of that day or as soon thereafter as counsel may be heard, why an order should not be made pursuant to Bankruptcy Rule 802(c) granting an extension of time for the filing of a notice of appeal from the order made by said Honorable John J. Galgay entered herein on the 29th day of July, 1976, to and including August 16, 1976, the date upon which such notice of appeal was actually filed with this Court; and it is

FURTHER ORDERED, that service of a copy of this order and of the papers upon which it is made, be delivered on or before the 8th day of September, 1976, upon Wachtell, Lipton, Rosen & Katz, special counsel for defendant and Charles S. Rodman, Trustee of the Estate of W. T. Grant Company, Bankrupt, shall be deemed good and sufficient service of this order to show cause and said papers.

Dated: New York, New York
September 8th, 1976

S/ John J. Galgay
BANKRUPTCY JUDGE

AFFIDAVIT OF DIRK S. GOULD, ESQ., FOR PLAINTIFFS,
IN SUPPORT OF MOTION TO EXTEND TIME TO APPEAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

In Re	:	
W. T. GRANT COMPANY,	:	
	:	
Bankrupt,	:	
	:	In Bankruptcy
PAUL S. BERGER, Trustee and RONALD M.	:	No 75 B 1735
LEE and SUTRO MORTGAGE INVESTMENT TRUST,	:	
individually and on behalf of all others	:	
similarly situated,	:	
	:	
Plaintiffs-Appellants,	:	<u>AFFIDAVIT</u>
- against -	:	
	:	
CHARLES G. RODMAN, Trustee in Bank-	:	
ruptcy of W. T. GRANT COMPANY,	:	
Bankrupt,	:	
	:	
Defendant-Appellee.	:	

-----X

STATE OF NEW YORK)
)
COUNTY OF NEW YORK) ss.:

DIRK S. GOULD, being duly sworn, deposes and says:

I am an officer of Alter, Lefevre, Raphael, Lowry & Gould, P.C., associate counsel for plaintiffs herein and make this affidavit in support of plaintiffs-appellants' application for an order pursuant to Rule 802(c) of the Rules of Bankruptcy Procedure, for an extension of time to file appeal from the order of the Honorable John J. Galgay, Bankruptcy Judge, entered on July 29, 1976 which, among other things, dismissed the complaint herein. A copy of the order is attached as Exhibit A.

The facts upon which this application for an extension of time is based are as follows:

On August 5, 1976 the undersigned received from Irma Skoller, Secretary to Judge Galgay, a letter dated August 2, 1976 notifying the undersigned that the Court had entered an opinion order regarding this case. A copy of the letter (front and back) is attached as Exhibit B. As the Court will note, the receipt of such letter on August 5th was noted and stamped by deponent's receptionist on the reverse side of said letter. Such letter may have been sent in compliance with Rule 922; however, such rule requires that notice of entry of an order must be served immediately upon the entry of such order. The notice of entry here was not mailed until three days after the entry of the order and not received by deponent's firm until seven days after the entry of the order. It is my understanding that a copy of said letter dated August 2, 1976 was also mailed to Berger, Berger & Kahn, counsel for plaintiffs, but not received by them in California until August 9, 1976.

Upon receipt of the letter, an associate of this firm obtained a copy of the opinion from the Clerk's office which was then forwarded that same day to plaintiffs for their information and for a determination by them as to whether and what further proceedings should be taken.

On August 11, 1976, two days after receipt by them of the notice of entry and the copy of the opinion order, California

counsel mailed a notice of appeal from the order dismissing the complaint. Thus the notice of appeal was mailed within two days after receipt of the notice of entry by California counsel (within seven days after receipt by New York associate counsel) and within twelve days after the entry of the order. However, such notice of appeal, copy attached as Exhibit C, apparently was not filed by the Clerk until August 16, 1976; it is unclear when the notice of appeal was actually received by the Clerk. Surely any delay in the filing of the notice by the Clerk should not be charged against plaintiffs.

Prior to August 5, 1976, no one in deponent's firm nor anyone at the offices of California counsel had any idea that a decision had been rendered in this matter.

This motion to dismiss was orally argued on March 16, 1976, at which time, a companion motion by plaintiffs for certification of this action as a class action was also to have been heard. However, the certification motion was successively adjourned from time to time at the urging of counsel for defendant (over plaintiff's objection) on the grounds that the motion for certification would be moot if the motion to dismiss were granted. Finally, on June 15, 1976, defendant's counsel acquiesced in plaintiff's position and the motion for certification was argued. At the argument of the certification motion, the Court was of course, made aware that no decision had been rendered on the

motion to dismiss. A further period of one and one-half months elapsed until finally on July 29, 1976, four and one-half months after the motion to dismiss was originally argued, a decision was entered granting the motion to dismiss.

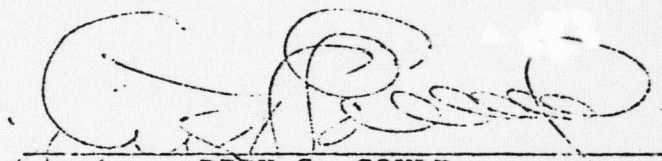
Periodically during this time, an associate of deponent's office either called or appeared at Court in order to ascertain whether a decision had been entered. It is submitted it would be unreasonable and unduly burdensome to expect counsel to either call the Court or appear at Court every day during this period of time in order to ascertain when a decision had been made on this motion.

Defendant has now moved in the District Court for an order dismissing plaintiff's appeal on the grounds that the notice of appeal was not timely filed. Such motion is returnable September 14, 1976. A dismissal of the appeal would be a grave miscarriage of justice, tantamount to a denial of due process, not only to plaintiffs but to the entire members of the class of landlords whom plaintiffs seek to represent. Substantial issues have been raised in this proceeding which should have appellate review.

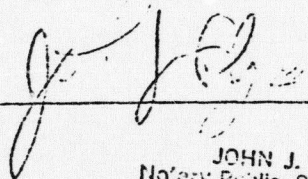
It is respectfully submitted that the foregoing facts show that plaintiffs intended to timely file an appeal herein and that the failure to file the notice of appeal herein within ten days from the entry of the order was unintentional and excusable. Rule 802(c) permits an extension of time to file an

appeal even when application is made after the expiration of time upon a showing of excusable neglect if the order does not authorize the sale of property (as it does not here) and provided the extension does not exceed 30 days after the entry of the order (i.e. 20 days after the original 10 day period for filing an appeal). Here, the notice of appeal was filed within 18 days from the date of entry of the order.

WHEREFORE, deponent respectfully requests that the order to show cause attached hereto be signed placing this motion on the Court's calendar of September 13, 1976 and that an order be made permitting the extension of time for the filing of the notice of appeal herein to August 16, 1976, the date on which the said notice was actually filed.


DIRK S. GOULD

Sworn to before me this
7th day of September, 1976



JOHN J. FLYNN III
Notary Public, State of New York
No. 654230 Qual. in Westchester County
Cert. Filed in New York County
Commission Expires March 30, 1978

EXHIBIT A TO GOULD AFFIDAVIT - ORDER OF HON.
JOHN J. GALGAY, BANKRUPTCY JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In The Matter
-Of-

W. T. GRANT COMPANY,

Debtor,

PAUL S. BERGER, Trustee, and RONALD M.
LEE and SUTRO MORRIS, Trustee of
TRUST, individually and on behalf of
other creditors of the

Plaintiffs,

W. T. GRANT COMPANY,

Defendant.

No. 75 B 1735
MEMORANDUM OPINION

JOHN J. GALGAY - Bankruptcy Judge

This is still another action against W. T. Grant Company, ("Grant"), arising out of its obligations under leases for real property. Plaintiffs Berger, Lee and Sutro seek to enforce their rights and those of other landlords under leases with Grant by means of a class action under Federal Rules of Civil Procedure 23(b)(1)(A), (b)(1)(B), (b)(2) or (b)(3) alternatively. Grant has opposed this action with a motion to dismiss for failure to state a claim upon which relief can be granted.

Upon consideration of the various arguments set forth in written memoranda and at a hearing before me

BEST COPY AVAILABLE

on March 16, 1976, and upon the proposed findings of fact and conclusions of law submitted by both parties, the Court does hereby grant the relief requested by Grant in its motion to dismiss.

The relevant facts are not in dispute.

Plaintiffs Berger and Lee filed a complaint with this Court dated January 8, 1976 on behalf of themselves and "All persons similarly situated". An amended complaint dated January 27, 1976 (Hereinafter the "complaint") was subsequently filed, identifying the class as those "persons and entities who are lessors of real property and stores leased to the debtor-in-possession", (Complaint, Par.4), and more specifically, as those:

Trustees of various pension funds, Trustees of Real Estate Investment Trusts, individuals, corporations, partnerships and other entities who on behalf of the persons they represent, or themselves, are lessors of real property and stores located thereon, leased to Defendant as of October 2, 1975, all of which stores Defendant either has closed or intends to close permanently. (Complaint, Par. 7).

At the time this proceeding was commenced the number of such stores was in excess of 700. Pursuant to an order of this Court dated February 12, 1976, Grant was directed to liquidate its remaining operations. Accordingly, the number of stores which have already been closed is in excess of 1,000. Plaintiffs Berger and Lee are landlords

of one of the stores Grant closed in Eakers Field, California. Plaintiff Sutro Mortgage Investment Trust, which became a party plaintiff subsequent to the hearing upon this motion, is the landlord of a store in Thomaston, Georgia and claims a 70% stock interest in another store in Pasco, Florida.

Grant responded to the complaint with an application dated February 6, 1976 for an order to show cause why a judgment should not be made dismissing the complaint for failure to state a claim upon which relief can be granted, and a request, which was granted, staying all discovery proceedings:

Grant's motion to dismiss was supplemented with an affidavit by a member of the law firm acting as the debtor's counsel. In addition, the Court takes judicial notice of its prior orders in this Chapter XI case and of all proceedings heretofore had in such case. Because technically these matters are outside the pleadings, pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, Grant's motion shall be treated as one for summary judgment under Rule 56 of the Federal Rules. A hearing on this motion was held on June 15, 1976. However, because this Court is granting the debtor's motion for summary judgment, it is unnecessary to consider the question of whether the complaint as drawn meets all the prerequisites of a class

action. Certification of the plaintiff as a class is a distinct question from whether it may be continued on the virtue of its merits.

The determination whether there is a proper class does not depend on the existence of a cause of action. A suit may be a proper class action, conforming to Rule 23, and still be dismissed for failure to state a cause of action. Kahon v. Rosensteil, 424 F. 2d 161, 169 (3rd Cir. 1970).

Therefore, the determination of whether a class has been properly drawn in the complaint will not be reached.

It is plaintiff's contention that Grant's course of conduct with respect to the landlords of its various stores has been oppressive and that Grant commenced Chapter XI proceedings "as a device to escape from its obligations to collective Plaintiffs", (Complaint, Par. 10). Plaintiff alleges that it is the debtor's intention to eliminate landlords' claims, thereby rendering more valuable other creditors' claims against the estate (Complaint, Par. 10).

These allegations arise in the following context. Grant vacated plaintiffs' stores but has not made any attempt to reject the leases involved. In addition, the debtor has failed to make payments for use and occupation. In many instances, landlords entered into "pick-off agreements" whereby the lessor agrees to accept termination

of the lease in exchange for relinquishing the right to rent, use and occupation and damages. Plaintiff Sutro is representative of landlords who entered into such agreements.

Specifically, plaintiffs allege the following conduct by Grant which they claim entitles them to relief:

1. that Grant intentionally failed to advise plaintiffs of their rights in order to eliminate landlords' claims, (Complaint, Par. 10);
2. that Grant has taken "improper advantage" of the economic conditions it has created for landlords; (Complaint, Par. 11);
3. that Grant has withheld administrative rent, thereby jeopardizing the economic viability of plaintiffs' shopping centers, (Complaint, Par. 11);
4. that Grant breached the covenants of good faith and fair dealing implied in its leases for real property with plaintiffs, (Complaint, Par. 11);
5. that Grant has failed to reject leases or take any action towards scheduling a hearing pursuant to Rule 11-53, (Complaint, Par. 12);
6. that Grant "has been able to utilize its economic power and the power of the Bankruptcy Court to coerce lessors to execute 'pick-off agreements'", (Complaint, Par. 13);
7. that Grant has been "hiding behind the automatic injunction of Rule 11-44" (Complaint, Par. 13);
8. that Grant has breached its duty as an officer of the Court by failing to disclose to plaintiffs their rights to administrative rent or their rights as creditors in the event of lease rejection (Complaint, Par. 13);

9. and that Grant has been prevented from treating all of its creditors fairly and equitably, (Complaint, Para. 13).

Plaintiffs allege that they have suffered the following harm:

1. because of Grant's retention of its leaseholds, plaintiffs are unable to deal with their property as well as alienate it freely;
2. plaintiffs have been prevented from filing creditors' claims;
3. plaintiffs have unwittingly surrendered valuable rights to administrative rent and damages;
4. plaintiffs have been induced to settle with the debtor under extortionary conditions;
5. and that the total effect of Grant's conduct has been to "hold plaintiff's properties for ransom" in that they can neither sue Grant nor regain their property without being forced to relinquish valuable claims;

Plaintiffs seek the following relief:

1. that the automatic stay under Rule 11-44 be terminated to allow plaintiffs to enforce their rights through individual actions in state court;
2. in the alternative, an order rejecting the leases in question;
3. an order compelling Grant to pay use and occupation at the rates established by the leases until such time as each lease is rejected;
4. an order compelling Grant to reject leases and pay administrative rent to those landlords who previously entered into "pick-off agreements" as if such agreements had not been entered into;
5. unspecified money damages for bad faith; and
6. attorneys' fees and costs.

It is plaintiffs' contention that Grant is liable for use and occupation to each landlord as an expense of administration as long as the lease between the two parties is in effect. Plaintiffs claim that the debtor's retention of the exclusive rights to use and occupy the premises without the tendering of consideration to plaintiffs is unjust. Plaintiffs stress that the right to possession is at the very heart of the benefits conferred upon a lessee, and that the concomittant burdens imposed by the lease must be assumed by Grant. It is also plaintiffs' position that despite the fact that Grant ceased operations at its stores and surrendered its keys to the individuals landlords, the debtor's estate has been benefitted by Grant holding the premises for sale and using them as bargaining tools in its program of obtaining releases from various landlords.

It is well settled that the liability of a trustee in bankruptcy for use and occupation payments is limited to instances in which the debtor has physically occupied the premises. Palmer v. Palmer, 104 F. 2d 161 (2nd Cir., 1939); In re United Cigar Stores Corp., 69 F.2d 513, 515 (2nd Cir., 1934), cert. denied 308 U.S. 590 (1939); In re McCrory Stores Corp., 69 F. 2d 517, 518 (2nd Cir., 1934); Meehan v. King, 54 F. 2d 761, 763 (1st Cir., 1932); In re J. Frank Stanton Co.; 162 Fed. 169 (D. Conn., 1908); 120 Wall Associates v. Schilling, 266 F. 2d 548 (2nd Cir., 1959); 4A Collier, Bankruptcy, Par. 70.44 (4) (14th ed.,

1976) and 6. (5th ed., 1952). Inasmuch as [the debtor] has not continued to physically occupy any store, the trustee is not chargeable for use and occupation.

Plaintiffs, however, rely on Dayton Hydraulic Co. v. Felsenthal, 116 Fed. 961 (6th Cir., 1902) to substantiate their position that priority claims for use and occupation can arise even if there has been no physical use of creditors' property as long as some benefit has been conferred upon the estate. Dayton concerned a situation in which the bankrupt retained the lease for certain industrial real estate to prevent his competitors from making use of it. The Sixth Circuit allowed a priority claim against the debtor's estate despite the fact that there was no physical possession of the premises.

Even though there need be no physical possession in all circumstances under the Dayton ruling, the appropriateness of allowing use and occupation as expenses of administration in cases such as the one before this Court was discussed at length in American Anthracite and Bituminous Coal Corp. v. Leonardo Arrivabene, S. A., 280 F. 2d 119, (2nd Cir., 1960), a case in which creditors tried to assert claims for freight and demurrage as administration expenses. The Court finds Chief Justice Lumbard's reasoning persuasive:

Here the only benefit conferred upon the debtor-in-possession by the presence of the appellants ships for the period between the

... of the ... was the value of the option ... or reject the charter. The only sort of benefit would be realized in the case of a lease of real property not occupied by the debtor; yet in exactly such a situation we denied any priority, In re United Cigar Stores, 2 Cir., 69 F. 2d 513, certiorari denied sub nom. Reisenwebers, Inc. v. Irving Trust Co., 1934 293 U.S. 566, 55 S. Ct. 76, 79 L. Ed. 665. It is true that this may place certain contract creditors in an "equivocal position." In re Greenpoint Metallic Bed Co., 2 Cir., 1940, 113 F. 2d 881, where they are obliged to keep their property or services available for the debtor for a brief period and obtain no more than a general claim for what they have lost in the interval. However, this hardship must be weighed against the serious effect on other creditors of obliging the trustee or debtor-in-possession to make an immediate decision to reject or affirm, at a time when he's surrounded with all the problems incident to the early days of a bankruptcy proceeding, on pain of exposing the estate to possibly heavy priority claims for each day of delay. We think Congress' assessment of the relative weight to be accorded these competing considerations is reflected in the Chandler Act amendment of Sec. 70, sub. b of the Bankruptcy Act, 11 U.S.C.A. Sec. 110, sub. b., directing that "Within sixty days after adjudication, the trustee shall assume or reject any executory contract, including expired leases of real property: Provided, however, that the Court may for cause shown extend or reduce such period of time." Although the sixty-day limitation of Section 70, sub. b is not specifically applicable to Chapter XI proceedings, still it was open to appellants to move for an immediate affirmance or rejection; having failed to do this, they cannot be heard to argue it was inconceivable the Court would have listened to them if they had. Moreover, in Sec. 70, sub. b Congress reaffirmed another means whereby persons like appellant

can protect themselves by codifying the generally accepted judicial rule making enforceable an express covenant that an assignment by operation of law or the bankruptcy of a party shall terminate the lease. Id. at 126.

Plaintiff's reliance on Central Manhattan Properties, Inc. v. D. A. Schutte, Inc., 1 F. 2d 728 (2nd Cir., 1937) is misplaced since that case dealt with a situation in which the debtor derived profits from retention of the premises in the form of subrents. Judge Hand noted however that:

The power of a trustee in bankruptcy, and of a debtor in reorganization, to withhold leased property pending deliberation, is too well settled for debate. The often considered language in sub-division (b) (10) of section 77B (11 U.S.C.A. Sec. 207(b)(10) presupposes it, and is built upon it, though the debtor must decide within a reasonable time, and the lessor can force it to do so, if it does not. The period of its indecision, short or long, is necessarily at the expense of the lessor, and for the sole benefit of the debtor, which in effect is allowed to play fast and loose with the property, while its affairs are being straightened out. Id. at 729.

In sum, Grant's obligation for use and occupation ceased when it vacated the leased premises. Accordingly, plaintiffs prayer for use and occupation payments for the period between such vacation and the time of rejection or other lease termination fails to state a claim.

Plaintiffs also request an order turning aside the agreements entered into by landlords such as plaintiff Sutro. The basis for this request is the various allegations that Grant created economically oppressive conditions with respect to landlords and then coerced the "pick-of agreements". Without expressing any opinion as to the relative fairness of the terms of the agreements, which in essence require landlords to release the debtor from all liabilities arising on or after October 2, 1975, it is essential to evaluate the circumstances in which these agreements were negotiated. The Court finds plaintiffs' characterization of the circumstances to be unrealistic.

As demonstrated by both the American Anthracite and Central Manhattan Properties cases above, the lessor of real property is not without recourse during the period in which the debtor or trustee has not yet moved to assume or reject his lease. The landlord is free to petition the Court for rejection. Grant has consented to many such orders and has indicated that it has no objection to such relief insofar as the named plaintiffs are concerned. With this relatively simple alternative available to plaintiffs, it is difficult to sympathize with plaintiffs' tales of oppression and helplessness at the hands of a calculating debtor. I find plaintiffs'

argument that a motion to compel rejection is expensive and burdensome to be unpersuasive. Bearing this in mind, the circumstances in these proceedings contradict plaintiffs' assertions of coercion. The "pick-off agreements" were authorized by orders of this Court and served the interest of landlords as well as those of Grant by allowing lessors to put their property to other uses when attractive proposals arose.

This Court will not, therefore, set aside the numerous agreements reached between various landlords and Grant. The "pick-off agreements" are binding and effective contracts which are the result of arm's length negotiation.

Turning to plaintiffs' request to lift the automatic stay imposed by Rule 11-44 to allow landlords to enforce their rights in state court, this Court must deny any such request. Assuming that plaintiffs seek to enforce their rights to obtain judicial declarations of lease termination, a lifting of the stay would be a surrender of the exclusive jurisdiction given to this Court over the debtor's property by virtue of Sec. 311 of the Bankruptcy Act. It is beyond dispute that "property" includes leasehold interests, and therefore the Chapter XI court has exclusive jurisdiction over proceedings to terminate leases signed by the debtor

commenced after the filing of the petition. Plaintiffs' state rights and remedies with respect to lease termination are enforceable in this Court, and no compelling reasons have been submitted, such as undecided questions of state law, which would warrant subjecting the debtor at this point to multifarious litigations all over the country. Therefore, plaintiffs' request for a lifting of the stay imposed under Rule 11-44 must fail.

Plaintiffs' alternative prayer for relief requests this Court to reject all leases between Grant and the purported class. Although the named plaintiffs are free to submit motions on an individual basis to compel rejection of leases in effect between them and the debtor, class actions, which are made available in bankruptcy as a vehicle for adversary proceedings under Part. VII of the Bankruptcy Rules, are not proper procedural tools for obtaining such relief. Rule 11-61 (a) sets forth the types of contested proceedings to which Part VII adversary proceedings are applicable in Chapter XI, and the relief requested in plaintiffs' alternative prayer is clearly not among the proceedings listed therein. Moreover, the relief requested is specifically available under Rule 11-53, which concerns

the rejection of executory contracts, including leases, and describes the applicable procedural vehicle as a motion.

Since plaintiffs may not bring an adversary proceeding to compel rejection of their leases, a class action, which is incorporated in bankruptcy proceedings under Part VII, may not be used to request such relief. Therefore, plaintiffs alternate prayer for relief fails to state a claim.

However, this Court is not unmindful of the difficult position in which the moving plaintiffs in this proceeding find themselves. This is in large part due to the enormity of the proceedings which has resulted in the debtor taking a prolonged period of time in which to exercise its rights of assumption or rejection. Although Messrs. Berger and Lee may not proceed to compel rejection of leases on behalf of landlords as a class, in order to avoid putting them to unnecessary duplication of effort and expense, this Court will treat the complaint as an individual request by motion to compel rejection of the Berger and Lee lease with Grant. The debtor has consented to such a motion, and it is hereby ordered.

I find the allegation that Grant has breached its duty to plaintiffs by failing to advise the various landlords as to their legal rights in connection with Grant's

vacation and surrender of the various leased premises to be without merit. No provision of the Bankruptcy Act or the Rules requires a debtor to consult with a creditor regarding the latter's legal position and offer affirmative advice. The informational duties imposed on a debtor by Rule 218 (3) and made applicable to Chapter XI by Rule 11-30 are limited to the furnishing of "information concerning the estate and its administration when reasonably requested by a party in interest....". A request for legal advice is not within the purview of this provision.

By reason of the foregoing, the complaint is hereby dismissed for failure to state a claim against Grant upon which relief may be granted, except that plaintiffs Berger and Lee are entitled to have their lease with Grant rejected.

IT IS SO ORDERED, and counsel for Grant will submit an appropriate order rejecting said lease.

DATED: New York, New York
July 26, 1976

/s/ John J. Galgay
JOHN. J. GALGAY
Bankruptcy Judge

EXHIBIT B TO GOULD AFFIDAVIT - LETTER FROM
JUDGE GALGAY'S SECRETARY TO PLAINTIFFS'
ATTORNEYS DATED AUGUST 2, 1976

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
UNITED STATES COURTHOUSE
FOLEY SQUARE
NEW YORK, N. Y. 10007

JOHN J. GALGAY
BANKRUPTCY JUDGE

August 2, 1976

Wachtel, Lipton, Rosen & Katz, Esqs.
299 Park Avenue
New York, New York
Theodore Gewertz, Esq.

Paul S. Berger,
9454 Wilshire Boulevard
Beverly Hills, California
Paul S. Berger and John Moss

Weil, Gotshal & Manges, Esqs.
767 Fifth Avenue
New York, New York
Richard P. Krasnow, Esq.

Finley, Kumble, Wagner, Heine, Underberg & Grutman, Esqs.
477 Madison Avenue
New York, New York

Alter, Lefevre, Raphael, Lowry & Gould, Esqs.
530 Fifth Avenue
New York, New York
Dirk S. Gould, Esq.

Re: W. T. GRANT COMPANY
No. 75 B 1735
Landlords Class Action

Gentlemen:

The Court has entered an opinion regarding the above.

It is "So Ordered". A copy of the opinion may be obtained
in the Clerk's Office, Room 230.

Very truly yours,


Irma Skoller
Secretary

A-36

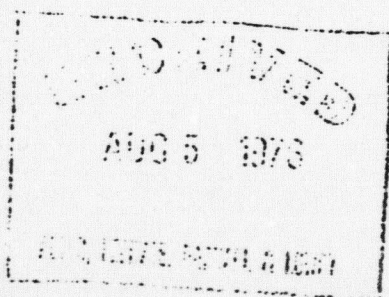


EXHIBIT C TO GOULD AFFIDAVIT - NOTICE OF
APPEAL TO THE DISTRICT COURT

BERGER, BERGER, KAHN & SHAFTON
9454 Wilshire Boulevard
Suite 410
Beverly Hills, California 90212

(213) 273-8380

ALTER, Lefevre, Raphael, Lowry
& GOULD
530 Fifth Avenue
New York, New York 10036

Attorneys for Plaintiffs and Appellants

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

In re:	)	BANKRUPTCY: 75-B-1735
	)	
W.T. GRANT COMPANY,	)	NOTICE OF APPEAL TO DISTRICT
	)	COURT.
Bankrupt,	)	
	)	
PAUL S. BERGER, Trustee	)	
and RONALD M. LEE, in-	)	
dividually and on behalf	)	
of all others similarly	)	
situated, and SUTRO MORT-	)	
GAGE INVESTMENT TRUST,	)	
	)	
Appellants,	)	
	)	
vs.	)	
	)	
W.T. GRANT COMPANY,	)	
	)	
Appellee.	)	

PAUL S. BERGER, Trustee and RONALD M. LEE, in-
dividually and on behalf of all others similarly situated, and
SUTRO MORTGAGE INVESTMENT TRUST, Plaintiffs herein, hereby Appeal
to the United States District Court for the Southern District of
New York from the Order of the Honorable JOHN J. GALGAY, Bankruptcy
Judge, entered in this action on or about August 2, 1976, dismissing

the Complaint herein for failure to state a claim against GRANT upon which relief may be granted.

Plaintiffs also hereby appeal the Order of the Honorable John J. Galgay, Bankruptcy Judge, entered March 16, 1976, pursuant to Nunc Pro Tunc Order dated June 8, 1976, denying Plaintiffs' Motion for Bond, and Plaintiffs' Notice of Appeal from said Order and Designation of Records and Issues on Appeal, both dated March 23, 1976.

Parties to the Orders appealed from and the names and addresses of their respective attorneys are as follows:

Plaintiffs:

BERGER, BERGER, KAHN & SHAFTON
9454 Wilshire Boulevard
Suite 410
Beverly Hills, California 90212

(213) 273-8380

ALTER, LEFEVRE, RAPHAEL, LOWRY
& GOULD
530 Fifth Avenue
New York, New York 10036

(212) 687-4426

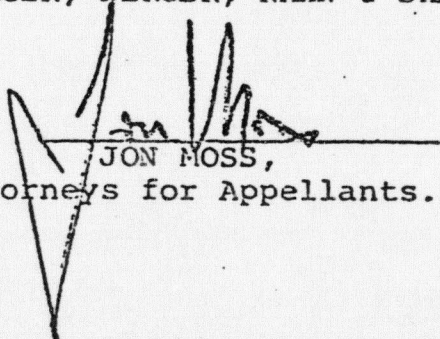
Defendant:

WACHTELL, LIPTON, ROSEN & KATZ
299 Park Avenue
New York, New York 10017

(212) 371-9200

DATED: AUGUST 11, 1976

BERGER, BERGER, KAHN & SHAFTON

By: 
JON MOSS,
Attorneys for Appellants.

-----X

STATE OF NEW YORK)
COUNTY OF NEW YORK) : ss.:

1. This affidavit is submitted in opposition to plaintiffs' motion, purportedly pursuant to Bankruptcy Rule 802(c), to extend plaintiffs' time to appeal from the order of this Court, dated July 26, 1976 and entered on July 29, 1976, which order granted the Trustee summary judgment dismissing the amended

complaint herein for failure to state a claim against Grant upon which relief may be granted. Plaintiffs' motion is based upon their claimed "excusable neglect" in admittedly not filing their notice of appeal until 18 days after entry of the order appealed from -- long after the expiration of the ten-day period provided for in Bankruptcy Rule 802(a). As shown below, the motion must be denied, since: (a) this Court is without power to grant the relief requested, by reason of the fact that it was made subsequent to the expiration of 30 days after entry of the order appealed from and the maximum time for which an extension may be granted has expired; and (b) even if the power to grant such relief exists, no showing of "excusable neglect" sufficient to warrant such relief has been made by plaintiffs. In any event, no decision upon this motion should be made until after determination of the Trustee's pending motion before the District Court to dismiss the appeal, which motion is scheduled to be heard on Tuesday, September 14, 1976.

2. A chronological history of the events leading up to the instant motion is crucial to its determination. Bankruptcy Rule 802(a) provides in relevant part that the notice of appeal from the Bankruptcy Court to the District Court "shall be filed with the referee [bankruptcy judge] within 10 days of the date of the entry of the judgment or order appealed from." In the present case, as noted, the order appealed from was entered on July 29, 1976. A copy of the page of the Docket Sheet maintained by the Bankruptcy Court showing the entry of such order on July 29, 1976 is annexed hereto as Exhibit "A". The relevant entry is the only entry for July 29, 1976 and has been underlined

for the Court's convenience. That entry reads as follows:

7/29/76 Filed 'so ordered' Memorandum opinion dated (7/26), re: Paul S. Berger Trustee, and Ronald M. Lee and Sutro Mortgage Investment Trust.

3. The notice of appeal filed by plaintiffs, dated August 11, 1976, was not filed until August 16, 1976 -- 18 days after entry of the July 29, 1976 date upon which the order appealed from was entered. (A copy of the notice of appeal showing -- as required by Bankruptcy Rule 804 -- the filing date to be August 16, 1976 is annexed hereto as Exhibit "B".) The Docket Sheet entry of the notice of appeal indicates that plaintiffs were notified on or shortly after August 16, 1976 that the notice of appeal was not timely filed. That entry reads:

8/16/76 Filed notice of appeal by attorneys for Paul S. Berger, Trustee and Ronald M. Lee and Sutro Mortgage Investment Trust, re: order dated 7/26, entered 7/29/76. Notified of late filing and \$10.00 filing fee. Sent notice of 806. Copy sent to attorneys for Bankrupt.

(A copy of the relevant Docket Sheet page with the above entry underlined is annexed hereto as Exhibit "C".) No extension of time to file the notice of appeal beyond the 10-day period provided for by Bankruptcy Rule 802 had been sought or granted at the time the notice of appeal was filed or at any time thereafter prior to the making of this motion by order to show cause dated September 8, 1976 -- 41 days after entry of the order from which an appeal is sought.

4. By notice of motion and affidavit dated August 30, 1976, the Trustee made a motion addressed to the District Court to

dismiss plaintiffs' appeal upon the ground that it was not timely filed. As noted above, such motion is scheduled to be heard on September 14, 1976. In your deponent's moving affidavit upon such motion, your deponent pointed out, inter alia, that plaintiffs had failed to seek, pursuant to Bankruptcy Rule 802(c), an extension within which to file their notice of appeal. Plaintiffs then brought this motion on September 8, 1976.

5. The language of Bankruptcy Rule 802(c), the Advisory Committee's Report and the comments with respect to such Rule make clear that no extension of time to file a notice of appeal may be granted unless made within 30 days after entry of the order appealed from. Thus, Rule 802 provides in pertinent part:

TIME FOR FILING NOTICE OF APPEAL

(a) Ten-Day Period. The notice of appeal shall be filed with the referee within 10 days of the date of the entry of the judgment or order appealed from.
* * *

* * *

(c) Extension of Time for Appeal. The referee may extend the time for filing the notice of appeal by any party for a period not to exceed 20 days from the expiration of the time otherwise prescribed by this rule. A request to extend the time for filing a notice of appeal must be made before such time has expired, except that a request made after the expiration of such time may be granted upon a showing of excusable neglect if the judgment or order does not authorize the sale of any property.

The intention of the drafters of Rule 802(c) is made clear by the last sentence of the Advisory Committee's note:

Thus, the maximum time allowable under this rule for filing an appeal is 30 days after the entry of the judgment or order appealed from or 30 days from the entry of an order disposing of a motion that terminates the running of the time for filing an appeal as provided in subdivision (b).

Applying such intention to a situation such as the instant case, wherein an extension of time is sought subsequent to the expiration of 30 days after entry of the order appealed from, the authors of 13 Collier, Bankruptcy ¶ 802.07[6] conclude:

So the last sentence of subdivision (c) should be construed as if it read:

" . . . A request to extend the time for filing a notice of appeal must be made before the expiration of the time prescribed by subdivisions (a) and (b) of this rule [10 days], except that a request made within 20 days after the expiration of such time may be granted for a period not exceeding the remaining portion of said 20 day period upon a showing of excusable neglect if the judgment or order does not authorize the sale of any property. After the expiration of such 20 day period, no extension shall be granted under any circumstances."

If it were so written, it would then be abundantly plain to any party who had slept for 31 days that his relief, if any, must come from some source other than Rule 802(c) * * *.
(Emphasis supplied.)

6. Thus, although plaintiffs purport to seek an extension from August 9, 1976 (the date the 10-day appeal time expired) until August 16, 1976 (the date plaintiffs' notice of appeal was filed), no such retroactive extension is possible. In effect, plaintiffs are seeking an extension beyond the 30-day period,

since the notice filed on August 16, 1976 is a nullity and, as shown, no extension can be granted if the request therefor is made after the 30-day period. To hold otherwise would subvert the whole purpose of placing time limits upon appeals -- to insure finality of orders and judgments. Thus, Bankruptcy Rule 803 expressly provides that:

Unless a notice of appeal is filed as prescribed by Rules 801 and 802, the judgment or order of the referee shall become final.

And, Bankruptcy Rule 906(b) expressly forbids the enlargement of the time for filing an appeal except to the extent and under the conditions stated in Rule 802.

7. If plaintiffs' latest ploy were allowed to succeed, a party could easily avoid the bar of a final judgment or order by simply filing, without leave of court, a late notice of appeal before the expiration of 30 days after entry of the order appealed from, bide his time until an indeterminate time after the expiration of such 30 days and only then move for an "extension" retroactive to the late filing date. The constant uncertainty which would be created by such a situation makes it unthinkable that the relief sought by plaintiffs is or could be authorized.

8. Moreover, assuming, contrary to the applicable law and rules, that this Court was authorized to grant the "extension" sought by plaintiffs pursuant to Rule 802(c), it is clear that plaintiffs have failed to make the requisite showing of "excusable neglect" which would warrant the exercise of this Court's discretion to grant the "extension" sought. Thus, while it might be

argued that "excusable neglect" exists in circumstances wherein a party does not learn of the entry of the order appealed from until after it is too late to file a timely appeal notice, no such circumstances are present here. Indeed, accepting the statement of plaintiffs' New York counsel as true (see Gould Affidavit, p. 2), plaintiffs admit that the notice from this Court of the entry of the order appealed from was received by such counsel no later than August 5, 1976.* Since the ten-day period for filing a notice of appeal did not expire until the end of August 9, 1976 (August 8, 1976, the tenth calendar day after the July 29, 1976 entry date was a Sunday), there can be no legitimate reason why counsel, who also admits obtaining a copy of the order from the clerk's office on August 5, 1976 (Gould Affidavit, p. 2), could not have easily filed a notice of appeal prior to the end of August 9, 1976. By plaintiffs' own admission, they had three full business days (August 5, August 6 and August 9) plus an intervening weekend to accomplish such task. Plaintiffs' counsel's lame excuse that he forwarded the opinion and order to plaintiffs that day to await further instructions just will not wash and, in any event, is no legitimate reason for not timely filing. As the Court is no doubt aware by now, the dominant "plaintiff" happens to be the senior partner of plaintiffs' California attorneys. A telephone call from New York counsel to such California attorneys on August 5, 1976 would no doubt have elicited the necessary instructions to proceed with the filing of a notice of appeal. Indeed, on more than one occasion prior to the opinion and order in question,

* The August 5, 1976 receipt stamp shown as part of Exhibit "B" to plaintiffs' counsel's affidavit which plaintiffs claim was contemporaneously stamped on the back of the August 2, 1976 notice can have little, if any, evidentiary value.

plaintiffs' counsel advised your deponent that plaintiffs would appeal any decision adverse to them. In sum, if there was any "neglect" here, such neglect was hardly "excusable".

9. In any event, even assuming, arguendo, that plaintiffs had a legitimate reason for not having timely filed their notice of appeal, there certainly can be no legitimate reason why they could not have sought an extension of time to file such notice, either prior to the expiration of the initial 10-day period or within the additional 20-day period provided by Rule 802(c) for seeking such an extension. Thus, plaintiffs could have sought an extension up to and including August 30, 1976, but chose not to do so. And, plaintiffs cannot even excuse such failure to act by claiming that they were not notified that their notice of appeal had been filed late. As shown above (¶ 3, supra), on or shortly after August 16, 1976, plaintiffs were notified by the Bankruptcy Court that their notice of appeal had not been timely filed. Significantly, the Gould Affidavit makes no mention of and does not even attempt to "excuse" the failure of plaintiffs to attempt to obtain an extension prior to the expiration of 30 days from the entry of the order appealed from. The reason for this is simple: no such "excuse" exists. Indeed, it was only after the Trustee moved to dismiss plaintiffs' appeal that plaintiffs belatedly sought to cover themselves by making this untimely motion.

10. In sum, as demonstrated above, plaintiffs' motion must be denied, since (a) this Court has no power or authority to grant the "extension" sought by plaintiffs; and (b) no "excusable neglect" on the part of plaintiffs has been shown which would

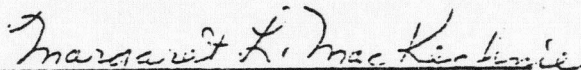
warra relief sought even if such relief could possibly be granted.

11. In the unlikely event that the Trustee's motion to dismiss the appeal, now scheduled to be heard on September 14, 1976 is denied, this motion will become moot. Accordingly, it is respectfully suggested that no determination be made upon the instant motion until after the determination of the Trustee's motion to dismiss the appeal. If the Trustee's motion is granted, this Court should then proceed with the determination of this motion.

WHEREFORE, your deponent respectfully requests that plaintiffs' motion be denied in all respects.


Theodore Gewertz

Sworn to before me this
10th day of September, 1976.


Notary Public

MARGARET L. MAC KINNON
Notary Public, State of New York
No. 24-614375
Qualified in Kings County
Commission Expires March 30, 1977

A-48
EXHIBIT A TO GEWERTZ AFFIDAVIT - PAGE OF
DOCKET SHEET OF BANKRUPTCY COURT

75 B 1735

674

W.T. GRANT COMPANY

DOCKET NUMBER

DATE	PROCEEDINGS
7/28/76	Affidavit of service, re: osc dated 7/16, Taunton, Mass. Ret: 8/16
7/28/76	Affidavit of service, re: osc dated 7/16, Ogdensburg, N.Y. Ret: 8/16
7/28/76	Affidavit of service, re: osc dated 7/16, Skowhegan, Maine. Ret: 8/16
7/28/76	Affidavit of service, re: osc dated 7/16, Binghamton, N.Y. Ret: 8/16
7/28/76	Affidavit of service, re: osc dated 7/16, Reading, Mass. Ret: 8/16
7/28/76	Affidavit of service, re: osc dated 7/16, Caribou, Maine Ret: 8/16
7/28/76	Affidavit of service, re: osc dated 7/16, Brookhaven, Penna. Ret: 8/16
7/28/76	Affidavit of service, re: osc dated 7/16, Bennington, Vermont Ret: 8/16
7/28/76	Affidavit of service, re: osc dated 7/16, Watertown, Conn. Ret: 8/16
7/28/76	Filed s/c, re: for an order to vacate stay for Frances Swinick to proceed with action in N.J. Filed affidavit of indigency, no fee. Affidavit of service attached, Ret: 8/24 at 10:30
7/28/76	Filed copy of letter sent to Frances Swinick by attorneys for Trustee, re: s/c . Ret: 8/24 at 10:30
7/28/76	Filed Trustee's second report of stipulations and agreements cancelling and terminating leases . Affidavit of service attached
7/28/76	Filed n/m, re: for an order to settle and compromise Andorra Assoc. store #992, Philadelphia, Penna. offer. Ret: 8/31 at 10:30
7/28/76	Filed application to settle and compromise controversy by attorney for Andorra Associates Ret: 8/31 at 10:30
869) 7/29/76	Filed 'so ordered' Memorandum opinion dated (7/26) , re: Paul S. Berger Trustee, and Ronald M. Lee and Sutor Mortgage Investment Trust
7/30/76	Filed answer by attorneys for Trustee. re: Frank H. Cataldo, Inc. (Fairview Plaza, Chicopee, Mass store) Ret: 8/3 at 10:30
7/30/76	Filed answer to complaint of Muhlenberg Shopping Center Company by attorney for Trustee. Ret: 8/3 at 10:00. Affidavit of service
7/30/76	Filed answer by attorney for Trustee, re: osc Bennington, Vermont store. Ret: 8/16 at 10:00. Affidavit of service
7/30/76	Filed answer by attorney for Trustee, re: osc Binghamton, New York store. Ret: 8/16 at 10:00 Affidavit of service
7/30/76	Filed answer by attorney for Trustee, re: osc Brookhaven, Pennsylvania store. Ret: 8/16 at 10:00 Affidavit of service

EXHIBIT B TO GEWERTZ AFFIDAVIT - NOTICE OF
APPEAL TO DISTRICT COURT

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9454 Wilshire Boulevard
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Beverly Hills, California 90212

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ALTER, LeFEVRE, RAPHAEL, LOWRY
& GOULD
530 Fifth Avenue
New York, New York 10036

Attorneys for Plaintiffs and Appellants

FILED

AUG 16 1976

JOHN J. GALGAY
Bankruptcy Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

In re:	)	BANKRUPTCY: 75-B-1735
	)	
W.T. GRANT COMPANY,	)	NOTICE OF APPEAL TO DISTRICT
	)	COURT.
Bankrupt,	)	
	)	
PAUL S. BERGER, Trustee	)	
and RONALD M. LEE, in-	)	
dividually and on behalf	)	
of all others similarly	)	
situated, and SUTRO MORT-	)	
GAGE INVESTMENT TRUST,	)	
	)	
Appellants,	)	
	)	
vs.	)	
	)	
W.T. GRANT COMPANY,	)	
	)	
Appellee:	)	

PAUL S. BERGER, Trustee and RONALD M. LEE, in-
dividually and on behalf of all others similarly situated, and
SUTRO MORTGAGE INVESTMENT TRUST, Plaintiffs herein, hereby Appeal
to the United States District Court for the Southern District of
New York from the Order of the Honorable JOHN J. GALGAY, Bankruptcy
Judge, entered in this action on or about August 2, 1976, dismissing

the Complaint herein for failure to state a claim against GRANT upon which relief may be granted.

Plaintiffs also hereby appeal the Order of the Honorable John J. Galgay, Bankruptcy Judge, entered March 16, 1976, pursuant to Nunc Pro Tunc Order dated June 8, 1976, denying Plaintiffs' Motion for Bond, and Plaintiffs' Notice of Appeal from said Order and Designation of Records and Issues on Appeal, both dated March 23, 1976.

Parties to the Orders appealed from and the names and addresses of their respective attorneys are as follows:

Plaintiffs:

BERGER, BERGER, KAHN & SHAFTON
9454 Wilshire Boulevard
Suite 410
Beverly Hills, California 90212

(213) 273-8380

ALTER, LEFEVRE, RAPHAEL, LOWRY
& GOULD
530 Fifth Avenue
New York, New York 10036

(212) 687-4426

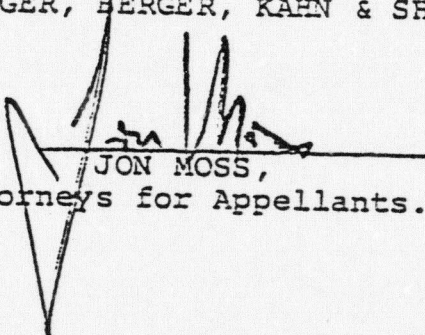
Defendant:

WACHTELL, LIPTON, ROSEN & KATZ
299 Park Avenue
New York, New York 10017

(212) 371-9200

DATED: AUGUST 11, 1976

BERGER, BERGER, KAHN & SHAFTON

By: 

JON MOSS,
Attorneys for Appellants.

A-51

RECEIVED BY
AUG 19 1976
WACHTEL, LIPTON, ROSEN & KATZ

EXHIBIT C TO GEWERTZ AFFIDAVIT - PAGE OF
DOCKET SHEET OF BANKRUPTCY COURT

W. T. GRANT COMPANY

13 D 1735

JUG

DOCKET NUMBER

82

DATE	PROCEEDINGS
994)	8/16/76 Order signed granting Pennsylvania Plazas, Inc. (Haddonfield Properties, inc) leave to file and serve an amended complaint 8/13/76 Filed affidavit of service by attorney for Trustee, re: osc dated 8/11 Granjewel Jewelers and Distributors, Inc. Ret: 8/23 at 10:00 8/13/76 Filed affidavit of personal service by attorney for Trustee, re: osc dated 8/11 Granjewelers and Distributors, Inc. Ret: 8/23 at 10:00 8/13/76 Filed notice of deposition and request for production of documents by attorneys for Trustee upon Morgan Guaranty Trust Company on 9/16 at 10:00 at the offices of Weil, Gotshal & Manges, 767 Fifth Avenue, N.Y. (Schroder Trust Company) . Affidavit of service attached 8/17/76 Filed reply to answer and answer to Counterclaim by Frances Swinick re. s/c Ret: 8/24 at 10:30 8/16/76 Filed notice of appeal by attorneys for Paul S. Berger, Trustee and Ronald M. Lee and Sutro Mortgage Investment Trust, re: order dated 7/26, entered 7/29/76. Notified of late filing and \$10.00 filing fee. Sent notice of 806. Copy sent to attorneys for Bankrupt.
	8/17/76 Filed s/c, re: for an order to vacate stay and allow National Labor Relations Board to proceed with action regarding discharged employees (Stephanie Rome, Lois Turner, Doris Davis, Phyllis Grambling and Joy (Raffield) Forsyth) \$15.00 fee waived. Rrt: 9/20 at 10:30
995)	8/17/76 Stipulation signed (8/16) modifying stay as to action by Emily Dorsey
996)	8/17/76 Stipulation signed (8/16) modifying stay as to action by Mary Lach and Stanley A. Lach
997)	8/17/76 Stipulation signed (8/12) modifying stay as to action by Lorine Dixon
998)	8/17/76 Stipulation signed (8/12) modifying stay as to action by Lavonia Jackson
999)	8/17/76 Stipulation signed (8/16) modifying stay as to action by Guadalupe Bonilla
1000)	8/17/76 Stipulation signed (8/16) modifying stay as to action by Frieda Ackermann
1001)	8/17/76 Stipulation signed (8/12) modifying stay as to action by Antoinette DePeppe
1002)	8/17/76 Stipulation signed (8/13) modifying stay as to action by Minas Odabashian
1003	8/17/76 Order signed authorizing Trustee to compromise and settle controversy with Jewel Companies, Inc.

A-53
TRANSCRIPT OF HEARING HELD SEPTEMBER 13, 1976
ON MOTION TO EXTEND TIME TO APPEAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
(In Bankruptcy)

In the Matter
of

W. T. GRANT CO.,

Bankrupt

No. 75 B 1735

U. S. Courthouse
Foley Square
New York, New York

September 13, 1976

OSC, RE: GRANTING EXTENSION OF TIME
FOR FILING NOTICE OF APPEAL.

B E F O R E:

HON. JOHN J. GALGAY,

Bankruptcy Judge

Adjourned to September 14, 1976 at 10:00 o'clock A.M.

RAYVID REPORTING SERVICE

CERTIFIED STENOTYPE REPORTERS

150 NASSAU STREET

NEW YORK, N. Y. 10038

CORTLANDT 7-3877
3878

(4)

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3 A P P E A R A N C E S:

4

MESSRS. WACHTELL, LIPTON, ROSEN AND KATZ
Special Counsel to Trustee
299 Park Avenue
New York, New York

5

6

BY: LAWRENCE CHERKIS, ESQ. and
MARC H. ROSENBAUM, ESQ.

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MESSRS. WHITMAN AND RANSOM
Attorneys for U. S. Trust Co.
522 Fifth Avenue
New York, New York

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BY: JOEL GOLDMAN, ESQ.

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ROBERT DOUGLAS PICKLE, ESQ.
Attorney for Brown Group, Inc.
8400 Maryland Avenue
St. Louis, Missouri 63105

13

14

-AND- RONALD O. HEIER, ESQ.

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16

MESSRS. WINTHROP AND WINTHROP
Attorneys for Pagliuso and Roosth
10100 Santa Monica Boulevard
Los Angeles, California 90067

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BY: JOHN WINTHROP, ESQ.

18

19

MESSRS. ALTER, LE FEVRE, RAPHAEL, LOWRY AND GOULD
Attorneys for Paul Berger, et al
530 Fifth Avenue
New York, New York

20

21

BY: DIRK S. GOULD, ESQ.

22

-AND-

23

24

JOHN MOSS, ESQ.
Attorney for Paul Berger, et al
9454 Wilshire Boulevard - Suite 410
Beverly Hills, California 90210

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A P P E A R A N C E S:

PHILIP KLING, ESQ.

Attorney for W. T. Grant Co.
360 West 31st Street
New York, New York

P R O C E E D I N G S

MR. CHERKIS: I would like to
address myself primarily to the Berger
and Lee matter.

This is the return date of the
Berger and Lee motion for an extension of
time within which to file a notice of
appeal.

Our office has filed and served
on opposing counsel an affidavit in
opposition which I hand up to the Court
now (handing).

Mr. Gerwerts, who is the person
in our office who is familiar with the
matter is in Denver arguing a motion. He
requested that the oral argument on this
motion be adjourned until tomorrow morning.

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4 There is scheduled for tomorrow
5 morning an argument in the District Court
6 on our motion to dismiss their appeal by
7 reason of untimely filing a notice, so
8 that these generally have to be here anyway.

9 I would request that Your Honor
10 permit us to come down to this Court after
11 that argument is had tomorrow morning before
12 the District Court and make the necessary
13 oral argument here on the Berger and Lee
14 motion.

15 MP GOULD: Of course in our
16 moving papers we point out the fact that
17 the defendant had moved in the District
18 Court to dismiss the appeal that was filed.

19 I have to point out to the
20 Court that the motion by the trustee to
21 dismiss the appeal in the District Court
22 would be moot if Your Honor granted the
23 motion that we brought in this Court for
24 an extension of time to appeal.

25 I think that this motion should
certainly be decided before the District

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3 Court motion. We have so pointed that
4 out to the District Court in opposing
5 papers that we filed there.

6 MR. CHERKIS: I could point
7 out that this motion would be moot if the
8 district court granted it - - denied our
9 motion to dismiss the appeal up there, so
10 it cuts both ways.

11 MR. GOULD: I don't understand
12 how it can cut both ways if we have an
13 application pending here.

14 MR. CHERKIS: Of course it does,
15 because we have an application pending
16 there.

17 THE JUDGE: Are the same factual
18 arguments going to be made in the district
19 court as are made here? - - As I recall,
20 there is something to do with the unawareness
21 of the decision so ordered having been filed.
22 And docketed, I gather.

23 MR. GOULD: Yes. If I may
24 briefly describe the facts here. If Your
25 Honor recalls, the motion to which the

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motion was address was argued in March of this year, four and a half months prior to the time that the order was entered on July 29th.

The order was apparently entered on July 29th. That was also forty-five days from the time we were last in court.

I believe we argued the class certification motion before Your Honor at that time.

So that overall a period of about four and a half months had elapsed before the decision had been entered here.

From time to time we had been inquiring as to whether a decision had been entered.

On August 5th was the first time that we received any notification whatsoever that an order had been entered dismissing the class action.

That was sent out in a letter which was dated August 2nd, but not received

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3 until August 5th. So that we, in fact,
4 received notice seven days after the date
5 that the order was entered, even though
6 I believe Rule "922" of the Bankruptcy
7 Rules requires that prompt notice of the
8 entry of any order be given.

9 On August 5th, as soon as we
10 received notification, we received a copy
11 of the order. We mailed it to California
12 for instructions.

13 The last day to file with the
14 Bankruptcy Court would have been August 9th,
15 whcih was - - because August 8th was a
16 Sunday, so August 9th would have been the
17 last day to file.

18 On August 11th, it was two days
19 after counsel in California and plaintiffs
20 in California received notice that an order
21 had been entered. They mailed the notice
22 of appeal in to the Court. For some reason
23 that notice of appeal wasn't entered for
24 five days until August 16th.

25 Nevertheless, what we are asking

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3 for on this particular application is
4 the equivalent of that seven days in the
5 way of an extension, that seven days that
6 we had no notice or knowledge that an
7 order had been entered.

8 We are asking for an extension
9 of time to file the notice of appeal to
10 August 16th, which is the date that it
11 was actually filed.

12 THE JUDGE: What district court
13 judge is to hear this tomorrow?

14 MR. GOULD: I don't know.

15 MR. CHERKIS: I don't know the
16 name of the judge sitting. Even if the
17 argument is taken in an order other than
18 what they see, sir, there is nothing to
19 say an order will come down in the decision
20 you are asking for.

21 MR. GOULD: In "802C." if I
22 may read it, "The referee may extend the
23 time for filing notice of appeals by any
24 third party for a period not to exceed
25 twenty days from the expiration of the time

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3 otherwise prescribed by this rule".

4 I am reading from the rule.

5 MR. CHERKIS: But we are not
6 arguing substance now, this is an application
7 for an adjournment of an oral application.

8 MR. GOULD: I am not arguing
9 substance, I am arguing procedure. I am
10 saying if Judge Galgay has the right to
11 extend the time for filing this appeal,
12 how then can the judge in the district court
13 deny him that right simply because a motion
14 is returnable before Judge Galgay has an
15 opportunity to rule on this motion.

16 THE JUDGE: I am going to put
17 this matter over until tomorrow, until
18 Mr. Gewerts can argue.

19 You can inform whoever is sitting
20 in the district court that I will hear oral
21 argument on the matter tomorrow.

22 If he can accomodate you by
23 letting you argue, if need be tomorrow
24 afternoon, perhaps it can be worked out
25 that way.

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MR. GOULD: We have asked for at the very least, if not a dismissal of that motion as premature, an adjournment of that motion.

We will see what the judge decides to do tomorrow on that.

THE JUDGE: I just stated that I will take oral argument and deal with it tomorrow when Mr. Gewertz is back.

We will put it on for 10:00 o'clock. But this is one of my regular calendar days. I will see if I can't reach you as promptly as possible in the morning. All of the papers, written papers are in the file.

MR. GOULD: Yes.

MR. MOSS: Does Your Honor intend to go to the district court first or hear first?

THE JUDGE: Hear first.

MR. CHERKIS: It is on the calendar for about 10:30 o'clock up there.

THE JUDGE: Well, I think

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3 somebody ought to talk - -

4 MR. GOULD: Somebody will
5 cover both places.

6 MR. CHERKIS: It will be
7 worked out.

8 THE JUDGE: Somebody ought to
9 alert the Court sitting in judge part one
10 that this will be heard down here as
11 promptly as I can reach it after 10:00
12 o'clock. I think they will accomodate you.

13 This is adjourned to September
14 14, 1976 at 10:00 o'clock.

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TRANSCRIPT OF ADJOURNED HEARING HELD SEPTEMBER 14, 1976 ON MOTION TO EXTEND TIME TO APPEAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
(In Bankruptcy)

In the Matter
of

W. T. GRANT COMPANY,

Bankrupt

No.

New York, New York

September 14, 1976

ADJOURNED HEARING ON MOTION TO EXTEND
TIME TO APPEAL

B E F O R E:

HON. JOHN J. GALGAY,

Bankruptcy Judge

RAYVID REPORTING SERVICE

CERTIFIED STENOGRAPHIC REPORTERS

150 NASSAU STREET

NEW YORK, N. Y. 10038

CORTLANDT 7-3877
3878

A P P E A R A N C E S:

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Attorneys - Special Counsel to Trustee
299 Park Avenue
NEW YORK, NEW YORK
BY: THEODORE GEWERTZ, ESQ., Of Counsel
-and-
LAWRENCE CHERKIS, ESQ., Of Counsel

- - - - -
P R O C E E D I N G S

THE JUDGE: This is a motion that
was brought on by Counsel for Berger and Lee
which was originally scheduled for hearing
yesterday.

At yesterday's hearing Counsel for
the Trustee pointed out that Mr. Gewertz, who
was the Attorney most familiar with this
matter and had drafted the papers, was in
Denver conducting an argument and requested

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3 that the matter be adjourned until today.

4 I granted that application. I
5 am aware that there is a hearing scheduled
6 before Judge Duffy in the District Court
7 in Part I at 10:30 today on a somewhat
8 related matter; namely, the Trustee's motion
9 to dismiss the Berger and Lee Complaint.

10 MR. GEWERTZ: To dismiss the
11 appeal.

12 THE JUDGE: The issue before me
13 is an application by Berger and Lee to extend
14 the time for appeal.

15 I will hear from Counsel for
16 Berger and Lee.

17 MR. GOULD: Your Honor, my name
18 is Dirk Gould of the firm of Alter, LeFoure,
19 Raphael, Lowry & Gould, associate Counsel
20 for Plaintiffs in this action.

21 With me is Mr. John Moss of the
22 firm of Berger, Berger & Kahn, Counsel for
23 the Plaintiffs.

24 This is an application pursuant
25 to Section 802C of the Rules of Bankruptcy

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3 Procedure for an extension of time for
4 the filing of a notice of appeal from this
5 Court's Order which was entered on July
6 29, 1976, which Order dismissed the Complaint
7 in this action.

8 I would like to briefly set forth
9 the facts.

10 The Order to which this motion is
11 addressed was made in connection with an
12 application by the W.T. Grant Company in
13 March of this year dismissing the Complaint.

14 The matter of Lee was argued before
15 the Court on March 16, 1976.

16 Now, a great deal of time ob-
17 viously elapsed between the date the motion
18 was argued in March and the date that the
19 Order was entered in - - on July 29th.

20 As the Court is aware, Plaintiffs
21 made various efforts to have the Court make
22 an expeditious determination of this motion.

23 It was also, incidentally, a motion
24 for certification of a class action which had
25 been successively adjourned from time to time

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3 at the request of the W.T. Grant Company,
4 over the objection of the Plaintiffs, but
5 was finally argued on June 15th, I believe,
6 1976.

7 At that time, of course, no Order
8 had been entered dismissing the motion to
9 dismiss the Complaint.

10 It was our understanding that the
11 Court would act expeditiously in connection
12 with that application, both applications.

13 Periodically, from time to time,
14 representatives of my office called and also
15 came down to Court to ascertain the status
16 of the matter.

17 However, it was not until August
18 5th that my office received notification
19 that the Order which we address ourselves
20 to today had, in fact, been entered on July
21 29th.

22 We received this communication
23 by letter dated August 2, 1976, as I say,
24 received August 5, 1976.

25 We immediately sent someone down

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3 to the Bankruptcy Court to obtain a copy
4 of the opinion.

5 The opinion was mailed out that
6 day to Counsel in California, Counsel of
7 Record and also Plaintiffs.

8 They did not receive the opinion,
9 the Order until August 9, 1976. It is my
10 understanding also that on August 9, 1976,
11 Berger, Berger & Kahn received their copy
12 of the letter from the Court advising that
13 the Order had been entered on July 29th.

14 As it turns out, August 9th was
15 the last day upon which, under Rule 802,
16 that an appeal could be taken from the Order
17 as of right.

18 That's because although it was
19 eleven days, August 8th was a Sunday and
20 August 9th was a Monday. Two days there-
21 after, after receipt of the opinion, the
22 Order, on August 11th, California Counsel
23 mailed to the Court a Notice of Appeal.

24 For some reason, just as I am
25 unable to explain why it took them - - why

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3 it took three days for the Court letter
4 of August 2nd to reach me, I am also unable
5 to explain why it took five days for the
6 Order to have been entered - - I'm sorry, not
7 the Order but the Notice of Appeal to have
8 been entered in the Bankruptcy Court.

9 We do not know, of course, on what
10 day it was received.

11 Of course, it would take longer
12 by mail from California, but, in any event,
13 it was mailed on the 11th and it was actually
14 filed in the Bankruptcy Court on the 16th.

15 This application seeks to have the
16 Court grant an extension of time to filing
17 the Notice of Appeal to August 16, 1976,
18 the date upon which the notice was actually
19 filed in the Bankruptcy Court.

20 In effect, that is a period of
21 seven days and as a matter of coincidence is
22 the same seven days by which we did not - -
23 or covering the seven day delay in our re-
24 ceiving notice of the entry of the Order.

25 I would also like to point out,

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3 of course, that under Rule 922 the Clerk
4 is required to promptly send out notice
5 of the entry of any Order.

6 We are aware of the rest of the
7 provisions of 922 which go further and pro-
8 vide that, of course, the lack of the giving
9 of such notice does not excuse the filing.

10 Now, Rule 802C provides that,
11 "The Referee may extend the time for filing
12 the Notice of Appeal by any party for a
13 period not to exceed twenty days from the
14 expiration of the time otherwise prescribed
15 by this Rule".

16 This, of course, means that the
17 extension can be granted for a period of
18 thirty days from the time that the Order
19 had been entered.

20 "A request to extend the time
21 for filing a Notice of Appeal must be made
22 before such time has expired, except that
23 if a request" - - "Except that a request
24 made after the expiration of such time may
25 be granted upon a showing of excusable

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neglect if the Judgment or Order does not authorize the sale of any property".

Now, obviously the last clause is not applicable here. I think it is significant that the request can be made after the time to file the appeal has expired.

There is no limitation in that Rule as to when that request must be made.

The limitation and the only limitation in Rule 802C is the time for filing the Notice of Appeal and that extension may not be more than twenty days from the original ten day period of time.

That's the only thing that this Rule speaks of.

Now, I would also refer the Court to a portion of the Advisory Committee notes, which reads in part as follows: "Moreover, any allowable extension cannot exceed the twenty day limitation prescribed in the first sentence of Subdivision C. This the maximum time allowable under this Rule for filing an appeal is thirty days after the

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entry of the Judgment or Order appealed from or thirty days from the entry of an Order disposing of a motion that terminates the running of the time for filing an appeal as provided in Subdivision B".

Again, the Advisory Committee notes speak only of the allowable extension, the maximum time allowable for the filing of an appeal.

It does not speak in terms of when that motion may be made.

Now, I think it would be tortured and convoluted reasoning to say that because the application for the extension is made after the thirty day period of time, that the appeal, which was actually filed within the period of time, would not be appropriate.

What we are asking is that the extension be granted to August 16th, which period is a seven day extension and it is well within the twenty day period of time for which an extension can be granted.

I think to do otherwise would be

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3 a grave miscarriage of justice and terribly
4 inequitable.

5 THE JUDGE: Let us hear from Mr.
6 Gewertz.

7 MR. GEWERTZ: Your Honor, there
8 is no question here that the Notice of Appeal
9 was not timely filed.

10 It was filed sixteen days after
11 entry of the Order. This motion was not
12 made until forty-one days after entry of the
13 Order by Order to Show Cause that Your Honor
14 signed on September 8, 1976, which motion
15 I should say came only after we had moved
16 in the District Court to dismiss the appeal
17 as not timely filed.

18 Now, our position, number one,
19 is that this Court does not have the power
20 to grant any extension at this time.

21 Number two, even if it did have
22 the power, there has been no showing here
23 made of any excusable neglect.

24 Now, Counsel has read from Rule
25 802C, which is the governing rule. I don't

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3 want to have to repeat that.

4 THE JUDGE: No, I have it in
5 front of me.

6 MR. GEWERTZ: Counsel has also
7 read from the last sentence of the Advisory
8 Committee's note to Rule 802C, which says,
9 "Thus the maximum time allowable under
10 this Rule for filing an appeal is thirty
11 days after the entry of Judgment or Order
12 appealed from or thirty days from the entry
13 of an Order disposing of the motion".

14 That is not relevant here, the
15 thirty day period is the relevant thing.

16 If Your Honor were to grant the
17 motion now, the thirty day period has already
18 expired.

19 So any extension now would be
20 meaningless.

21 The language in 802C is admittedly
22 a little bit vague.

23 However, the Advisory Committee's
24 note does make it clear and the authority
25 that I have found in 13 Collier, Paragraph

302.07 (6) interprets it as follows:

"So the last sentence of Subdivision C" - -
meaning Subdivision C of 302 - - "Should
be construed to read" - - this is a comment
on the Advisory Committee's comment.

THE JUDGE: In Collier.

MR. GEWERTZ: In Collier, "A re-
quest to extend the time for filing a Notice
of Appeal must be made before the expiration
of the time prescribed by Subdivisions A
and B of this Rule" - - that's the ten day
period - - "Except that a request within
twenty days after the expiration of such
time may be granted for a period not exceeding
the remaining portion of said twenty day
period upon a showing of excusable neglect,
if the Order or Judgment does not authorize
the sale of any property. After the expira-
tion of such twenty day period no extension
shall be granted under any circumstances".

The comment goes on to say, "If
it was so written it would then be abundantly
plain to any party who had slept for thirty-

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one days that his relief, if any, must come from some source other than Rule 802C".

I think it makes a lot of sense, that interpretation.

Otherwise you could have a situation where a party disregards the ten days, just files a Notice of Appeal at some point within the thirty days.

Then at some indeterminate time makes a motion like the present motion here. The purpose of Rule 802C and the purpose of Rule 803 and the purpose of all these filing provisions and all these provisions with respect to times to file appeals is to get finality at some point, finality of a Judgment or Order.

If Plaintiffs' interpretation were to be adopted, you wouldn't have the finality.

The parties who would be relying upon a final judgment would be in the dark about what their rights were, whether or not they could proceed with the transaction.

As far as - - I think that dis-

poses of the matter.

Insofar as the argument goes that they are only looking for a seven day extension, I think that misses the boat because that Notice of Appeal was not - - was void - - actually was void because it wasn't timely filed and no extension had been granted at the time it was filed.

Rule 802 provides, entitled, "Finality of a Referee's Judgment or Order", which says: "Unless a Notice of Appeal is filed as prescribed by Rules 801 and 802, the Judgment or Order of the Referee shall become final".

So the Order was final on that day. It could not be revived unless Rule 802 was followed within the applicable time periods.

So as far as that aspect, it is submitted that there is no power here to extend the time any further and the motion having been made after the thirty days, it is ineffective and there is no further

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3 authority to grant the extension.

4 Now, as far as excusable neglect
5 goes, I think it is abundantly clear that
6 there may have been neglect here, but certainly
7 not excusable.

8 I point out the following: The
9 notice was sent out from the Court on October
10 2nd - - August 2nd, three days after the
11 Order.

12 Admittedly, New York Counsel re-
13 ceived it on August 5th. Now, the Rules
14 provide that you have to have a New York
15 Counsel.

16 New York Counsel here has been
17 active in this case, he argued the class
18 action motion.

19 He admittedly received the notice
20 on August 5th. That left August 5th, August
21 6th, there was an intervening weekend and
22 August 9th within which to file a Notice of
23 Appeal.

24 Now we hear the excuse, "Well, I
25 sent it out to California".

The simple thing for them to do is call California Counsel, get their instructions and proceed to file a Notice of Appeal.

I don't see any great - - I mean, it's a minimum we can expect here of Counsel.

It's not a matter of getting authorization from various unknown Plaintiffs here.

The lady Plaintiff here is the senior partner of the lawfirm of the California Counsel here, as Your Honor is probably aware by now.

So they had time within which to file a timely notice within the ten days.

But it goes even beyond that, because the docket entry of the Bankruptcy Court Clerk's Office, which is Exhibit "C" to my - - Exhibit "c" to my Affidavit in Opposition, the docket entry on the 16th of August reads as follows: "Filed Notice of Appeal by Attorneys for Paul S. Berger, Trustee and Ronald M. Lee and Sutro Mortgage Investment Trust, re: Order dated 7/25,

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3 entered 7/29/76. Notified of late filing
4 and \$10.00 filing fee".

5 We are not making an issue of that.
6 "Sent copy of Notice of 806. Copy sent to
7 Attorneys for Bankrupt".

8 Now, they were notified that the
9 filing was late on August 16th. Give them
10 three days, four days for the filing, it
11 takes you to August 20th.

12 They still could have made a
13 motion for an extension within the thirty
14 day period, which would have expired August
15 28th or August 29th.

16 They did not do so. It was only
17 after we made this motion to dismiss the
18 appeal in the District Court that this
19 motion was made and I should add we initially
20 got an Affidavit in the District Court just
21 from California Counsel, there was no men-
22 tion of New York Counsel, that New York
23 Co. had received the notice of the entry
24 of the Order.

25 Now, lately they have now filed

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3 an Affidavit in the District Court by
4 New York Counsel, after I had raised the
5 issue.

6 So there is no real excusable
7 neglect here.

8 Even if Your Honor had the power
9 to grant this so-called extension, which
10 isn't really an extension, it's really a
11 nunc pro tunc extension, I think it is just
12 not called for in the Rules.

13 Even if you had the power, I
14 believe there is not a sufficient showing
15 of excusable neglect to justify any such
16 extension. Thank you.

17 MR. GOULD: May I just have one
18 short response to Mr. Gewertz?

19 THE JUDGE: Go ahead.

20 MR. GOULD: With respect to the
21 Collier's citation that Mr. Gewertz refers
22 to, I don't believe that there is any
23 reference there to a situation such as we
24 have represented here today; namely, that
25 there was a filing.

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3 I think the Collier's situation
4 refers to a situation where, in fact, the
5 Notice of Appeal had not been filed and ob-
6 viously then we are talking about a pros-
7 pective extension of time.

8 Here it is my understanding from
9 California Counsel that when they received
10 notice that the Notice of Appeal had al-
11 legedly been filed late, they relied on the
12 fact that the appeal actually had been filed
13 within the period under the Rule, the twenty
14 day period of time subsequent to the ten day
15 filing period as of right.

16 Therefore, they saw no need at
17 that particular moment to have filed any
18 application, again, taking the literal
19 reading of that Rule 802C.

20 As far as Mr. Gewertz' position
21 is concerned that we don't have finality,
22 it is quite obvious that one of the factors
23 that could be considered by the Judge, if
24 and when an application is made that is
25 beyond the thirty day period of time, would

ORDER AND MEMORANDUM DECISION OF HON. JOHN J.
GALGAY ON MOTION TO EXTEND TIME TO APPEAL

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be the further neglect perhaps on the part of a party filing a late notice of appeal in not making that kind of application.

But here we have only a short period of time that has elapsed. The further protection to a Bankrupt with respect to finality of Orders, of course, is the Bankrupt's right to make a motion to dismiss the appeal.

But here we have, I would think, a grossly inequity situation where we have the filing of the Notice of Appeal within the period which is provided for by the Rule and to dismiss this appeal would be just grossly inequitable.

THE JUDGE: On the question of dismissing the appeal, that is not before me, that will be before Judge Duffy.

However, I am prepared to rule. After having heard both parties and having examined the papers, I am persuaded that there exists excusable neglect, probably

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3 the fault of the Postal Service, possibly
4 the crush of business in my own Clerk's
5 office.

6 I am not persuaded that the
7 Counsel was bound to use telephone communica-
8 tion with his West Coast Counsel, although
9 it probably would have saved all the problem
10 had it been done.

11 Nevertheless, I am persuaded that
12 the whole purpose of Section 803C and the
13 Advisory Committee notes and that Section
14 of Collier's referred to by Counsel for the
15 Trustee intends to bring about a finality
16 of action.

17 I find that the - - that this
18 Court is without power to extend beyond
19 the thirty days the right to file an appeal.

20 This is a novel situation and I
21 gather that each party reserves its rights,
22 but I am making my finding on the basis of
23 what is before me at the moment.

24 The parties for the purpose of
25 any possible appeal from this proceeding

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may consider my comments in this record
as an Order.

The time for appeal would com-
mence running from today.

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ORDER TO SHOW CAUSE FOR RECONSIDERATION AND
REHEARING

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

In Re:	:	
W. T. GRANT COMPANY,	:	
Debtor,	:	
PAUL S. BERGER, Trustee, and	:	In Bankruptcy
RONALD M. LEE, individually and	:	No. 75 B 1735
on behalf of all others similarly	:	
situated,	:	
Plaintiffs,	:	
v.	:	ORDER TO
W. T. GRANT COMPANY,	:	<u>SHOW CAUSE</u>
Debtor.	:	

Upon the annexed Affidavits of JOHN MOSS and DIRK S. GOULD, both sworn to September 17, 1976, the exhibits thereto, the minutes of the hearing on September 14, 1976, the decision and order dated September 14, 1976, and upon all the papers in the proceeding heretofore had and sufficient cause appearing therefor, now, upon application of Alter, Lefevre, Raphael, Lowry & Gould, P.C., associate counsel for plaintiffs, it is

ORDERED, that Debtor show cause before the Honorable John J. Galgay, Bankruptcy Judge of this Court, in Room 234 of this Courthouse, Foley Square, New York, on the ¹³⁰28th day of September, 1976, at ten o'clock in the forenoon of that day or

as soon thereafter as counsel may be heard, why, pursuant to Bankruptcy Rules 923 and 925¹ and Rules 59 and 60(b) FRCP:

a) reconsideration and rehearing should not be made of this Court's decision and order dated September 14, 1976, which denied plaintiffs' application for an extension of time to file the notice of appeal herein from the order made by Honorable John J. Galgay and entered on July 29, 1976 and upon such reconsideration and rehearing that such application be granted or in the alternative that the Court indicate its intention to grant such application upon remand from the District Court, or

b) an order should be made vacating this Court's order entered July 29, 1976 which dismissed the complaint herein, and it is

FURTHER ORDERED, that service of a copy of this Order and papers upon which it is made be delivered on or before the 21st day of September, 1976, upon Wachtell, Lipton, Rosen & Katz, special counsel for Debtor and Charles G. Rodman, Trustee of the Estate of W. T. Grant Company which shall be deemed good and sufficient service of this Order to Show Cause and said papers.

Dated: New York New York
September 20th 1976

John J. Galgay
Bankruptcy Judge

AFFIDAVIT OF DIRK S. GOULD, ESQ., FOR PLAINTIFFS,
IN SUPPORT OF MOTION FOR RECONSIDERATION AND
REHEARING

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

In Re:	:	
W. T. GRANT COMPANY,	:	
Debtor,	:	In Bankruptcy No. 75 B 1735
PAUL S. BERGER, Trustee and	:	
RONALD M. LEE, individually and	:	
on behalf of all others similarly	:	<u>AFFIDAVIT</u>
situated,	:	
Plaintiffs,	:	
v.	:	
W. T. GRANT COMPANY,	:	
Debtor.	:	

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

DIRK S. GOULD, being duly sworn, deposes and says:

I am an attorney with Alter, Lefevre, Raphael, Lowry & Gould, P.C., associate counsel for plaintiffs in the above captioned proceeding. I make this affidavit in support of plaintiffs' application for reconsideration and/or rehearing of plaintiffs' prior application to this Court for an Order authorizing an extension of time to file a Notice of Appeal from this Court's Order dismissing the Complaint which was entered July 29, 1976 or in the alternative, for an Order vacating the Order of this Court entered on July 29, 1976. The basis of

this application is additional facts and evidence not previously brought to the attention of this Court but of which the Court should be aware. .

By Order to Show Cause dated September 8, 1976, and deponent's affidavit sworn to September 7, 1976, an application was made to this Court for an Order authorizing an extension of time to file a Notice of Appeal from this Court's said Order dismissing the action entered on July 29, 1976. A copy of such Order to Show Cause and the affidavit upon which it was based is attached hereto and made a part hereof as Exhibit A.

A hearing was held on the application on September 14, 1976. At the hearing it was urged by counsel for Grant's that the Court was powerless to grant the application for an extension of time to file the appeal to August 16, 1976 (the date on which the appeal was filed), because the Order had been entered on July 29th and although the Notice of Appeal was filed August 16th, 1976 (mailed August 11, 1976), an application for extension of time had not been made prior to the expiration of the 20 day period during which period an extension is permissible as provided in Bankruptcy Rule 802(c).

This Court found that although excusable neglect had been shown "probably the fault of the postal service, ^{possibly} ~~probably~~ the crush of business in my own clerk's office", that Rule 802(c) in effect required that request for extension must be made within the 20 day period referred to by Rule 802(c). A copy of the transcript of the hearing and order is attached as Exhibit B.

Without conceding the correctness of such interpretation, deponent believes that request for such relief had in effect, been made within said twenty day period. Attached hereto as Exhibit C is a copy of a letter from Jon Moss, Esq. of Berger, Berger, Kahn & Shafton, attorneys for plaintiffs, dated August 11, 1976. Such letter was addressed and directed to Judge John J. Galgay directly, not to the Clerk of the Court. Such letter, which was apparently received by Judge Galgay on August 16, 1976, states:

"Dear Judge Galgay:

Please find enclosed for filing, Plaintiffs-Appellants Notice of Appeal to District Court.

Kindly file this document and stamp this letter with your filing date stamp and return same to the undersigned in the enclosed, prestamped envelope.

Thank you for your cooperation."

It is submitted that the letter constitutes a request to Judge Galgay for the filing of the Notice of Appeal. Moreover, apparently at the instruction of Judge Galgay, the Notice of Appeal was filed and docketed. Subsequently, a copy of the letter was returned to the sender with the notation thereon as follows:

"Gentlemen:

This is to advise you that your Notice of Appeal has been received by our office. It is appealing an order docketed on 7/29/76, therefore the filing of this appeal is late.

Also, there is a \$10.00 filing fee to be paid by certified check or money order to Clerk of Court.

"Your appeal has been docketed on 8/16/76 and sent in to Judge Galgays Secretary. Copy of your appeal has been mailed to attorney for Bankruptcy.

ENCLOSED IS NOTICE OF BANKRUPTCY RULE 806."

Although California counsel was notified that the Notice of Appeal was late it was nevertheless docketed. Moreover, request was made for a \$10.00 filing fee which fee was subsequently forwarded by California counsel and accepted by the Clerk.

Rule 802(c) provides in part that:

"A request to extend the time for filing a Notice of Appeal must be made before such time has expired, except that a request made after the expiration of such time may be granted upon a showing of excusable neglect if a judgment or order does not authorize the sale of any property." (Emphasis Supplied.)

Collier's notes that such provision of 802(c) was adapted from the third paragraph of Rule 4(a), FRAP, which specifically requires that a request for an extension of time after the original time has expired shall be made by motion with such notice as the Court deems appropriate. However, it is further stated in Collier's (at Paragraph 802.07) as follows:

"Under Rule 4, FRAP, the request, if made after the time has expired, must be in the form of motion and on notice. No such requirement is made in the Bankruptcy Rule regardless of when the request is made. Undoubtedly, however, the Referee, under the Bankruptcy Rule, would have the discretion to require notice and hold a hearing." (Emphasis Supplied.)

Thus, a motion within the 20 day period of time did not have to be made; a mere request suffices.

It is submitted that the aforesaid letter dated August 11, 1976 (the time to appeal as of right expired August 9th, 1976), to Judge Galgay constituted such a request. Deponent has been advised by California counsel that when they received return of the copy of their letter dated August 11, 1976, with the notation that the appeal had been docketed albeit late, they believed no further action was required on their part. It is further submitted that the filing and docketing of the appeal at the direction of this Court is tantamount to the granting of such a request. If nevertheless, the Court did not intend by the filing and docketing of the Notice of Appeal to grant a request for an extension of time to file, it is respectfully submitted that the Notice of Appeal should have been returned with such advice. In such event, plaintiffs at least would have been alerted and would have been able to make application within the 20 day period of time.

Counsel took no further action because they assumed that the Notice of Appeal had been filed as directed by the Court.

Grant's counsel may argue that this Court is without jurisdiction to determine any applications subsequent to the filing of the Notice of Appeal. Certainly, if this Court were to ~~rule~~ rule that the filing of the Notice of Appeal on August 16, 1976, did indeed constitute in effect, the granting of an extension pursuant to Rule 802(c), the matter would be put to rest. In any event, if this Court finds that the filing of the

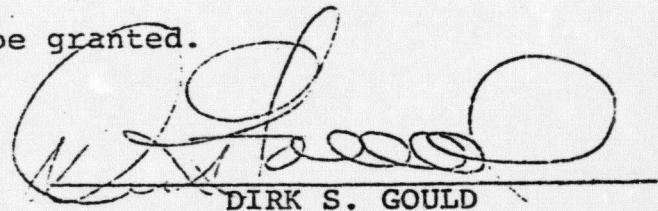
Notice of Appeal precludes it from acting on the application hereinabove discussed, request is made in the interest of justice;

a) that the Court indicate that it would grant such application if the appeal were remanded by the District Court to this Court for such purpose or in the alternative,

b) that this Court vacate its Order dated July 29, 1976 and make a new order dated currently in order to permit plaintiffs to file a new notice of appeal within a ten day period.

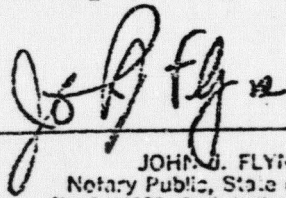
The granting of this application will not cause Grant's any prejudice or harm; the denial of this application would result in great prejudice and inequity to plaintiffs.

WHEREFORE, it is respectfully submitted that the plaintiffs' application should be granted.



DIRK S. GOULD

Sworn to before me this
17th day of September, 1976



JOHN J. FLYNN III
Notary Public, State of New York
No. 642330 Qual. in Westchester County
Cert. Filed in New York County
Commission Expires March 30, 1978

EXHIBIT A TO GOULD AFFIDAVIT - ORDER TO SHOW
CAUSE TO EXTEND TIME TO APPEAL AND SUPPORT-
ING AFFIDAVIT (reproduced herein at pages A-13 - A-19)

A-96

EXHIBIT B TO GOULD AFFIDAVIT - TRANSCRIPT OF
HEARING AND ORDER ON MOTION TO EXTEND TIME
TO APPEAL (reproduced herein at pages A-64 - A-86)

EXHIBIT C TO GOULD AFFIDAVIT - LETTER DATED
AUGUST 11, 1976 FROM JON MOSS, ESQ. OF BERGER,
BERGER, KAHN & SHAFTON, ATTORNEYS FOR PLAINTIFF,
TO JUDGE GALGAY

LAW OFFICES

BERGER, BERGER & KAHN

9454 WILSHIRE BOULEVARD

BEVERLY HILLS, CALIFORNIA 90212

AREA CODE 213
273-8100
272-3894

WILLIAM BERGER (1903-1974)
PAUL S. BERGER
CHARLES M. KAHN
JON ROGER MOSS
ANTHONY E. SHAFTON
PAUL FISLER
MARVIN L. BENSON
CHRIS ANN MAXWELL

August 11, 1976

FILED

AUG 16 1976

JOHN J. GALGAY
Bankruptcy Judge

Judge John J. Galgay
United States District Court
Southern District of New York
United States Courthouse
Foley Square
New York, New York 10007

Re: W. T. GRANT COMPANY
Case No: 75-B-1735

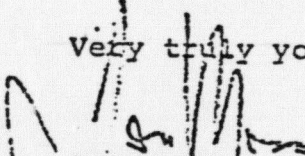
Dear Judge Galgay:

Please find enclosed for filing, Plaintiffs' and Appellants Notice of Appeal to District Court.

Kindly file this document and stamp this letter with your filing date stamp and return same to the undersigned in the enclosed, pre-stamped envelope.

Thank you for your cooperation.

Very truly yours,


JON MOSS for
Berger, Berger, Kahn & Shafton

JM:rts
Enclosures

cc: Dirk S. Gould

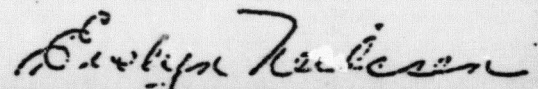
Gentlemen:

This is to advise you that your Notice of Appeal has been received by our office. It is appealing an order docketed on 7/29/76, therefore the filing of this appeal is late.

Also, there is a \$10.00 filing fee to be paid by certified check or money order to Clerk of Court.

Your appeal has been docketed on 8/16/76 and sent in to Judge Galgays Secretary. Copy of your appeal has been mailed to attorney for Bankrupt.

ENCLOSED IS NOTICE OF BANKRUPTCY FILE 806.



AFFIDAVIT OF JON MOSS, ESQ., FOR PLAINTIFFS, IN
SUPPORT OF MOTION FOR RECONSIDERATION AND
REHEARING

BERGER, BERGER, KAHN & SHAFTON
9454 Wilshire Boulevard
Suite 410
Beverly Hills, California 90212
(213) 273-8380

ALTER, LeFEVRE, RAPHAEL, LOWRY & GOULD
530 Fifth Avenue
New York, New York 10036
(212) 687-4426

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

In re:	)	In Bankruptcy
W. T. GRANT COMPANY,	)	
Bankrupt,	)	CASE NO: 75-B-1735
PAUL S. BERGER, Trustee, and	)	AFFIDAVIT IN SUPPORT OF
RONALD M. LEE, individually and	)	MOTION TO RECONSIDER
on behalf of all others	)	
similarly situated, and SUTRO	)	
MORTGAGE INVESTMENT TRUST,	)	
Plaintiffs,	)	
vs.	)	
W. T. GRANT COMPANY,	)	
Defendants.	)	

STATE OF CALIFORNIA)
COUNTY OF LOS ANGELES) ss:

I, JON MOSS, being duly sworn, say:

1. I am an associate in the firm of BERGER, BERGER, KAHN & SHAFTON, one of the attorneys of record for the plaintiffs in this class action, and am fully familiar with the facts set forth herein.

2. On August 9, 1976, I received a letter from Irma Skoller, secretary to Judge Galgay, indicating that an opinion had been entered with regard to one or more of the matters then under submission to the court. A copy of said letter is attached

1 hereto as Exhibit "A".

2 3. On August 9, 1976, I also received a copy of
3 Ms. Skoller's letter, together with a copy of the opinion, from
4 New York counsel, Dirk S. Gould, Esq., Alter, LeFevre, Raphael,
5 Lowry & Gould, Esqs. The quality of the copy was such that the
6 insertion of the date and judge's signature was not legible. A
7 copy of the last page of said copy of the opinion is attached
8 hereto as Exhibit "B".

9 4. I am informed that the copy I received was obtained
10 from the court clerk's office, pursuant to Ms. Skoller's letter.

11 5. The Skoller letter (Exhibit "A") led me to believe
12 that the Order had been entered August 2, 1976 or thereabouts.

13 6. I prepared a Notice of Appeal "from the Order . . .
14 entered in this action on or about August 2, 1976. . ." A copy
15 of said Notice of Appeal is attached hereto as Exhibit "C".

16 7. Due to some support problems -- principally, my
17 secretary's resignation and return to her home in Belize, Central
18 America that week -- the Notice of Appeal was not mailed until
19 August 11, 1976.

20 8. By my letter dated August 11, 1976 (a copy of which
21 is attached as Exhibit "D"), I requested Judge Galgay to file the
22 Notice of Appeal.

23 9. Approximately eight days later, I received a file-
24 stamped copy of my August 11 letter. At the bottom of the page
25 was a message from Evelyn Neilson advising that the Order
26 appealed from was docketed on July 29, 1976 and that the filing
27 of the Notice of Appeal was therefore late. Further, however, I
28 was informed that. "Your appeal has been docketed on August 16,
29 1976" and was notified of the \$10.00 filing fee payable. The
30 Neilson message is contained in Exhibit "D" also. Prior to the
31 Neilson memo, I had no knowledge that the Order had been entered
32 prior to August 2, 1976.

1 10. The \$10.00 filing fee was sent to the clerk by A-100
2 return mail. A copy of the transmittal letter is attached as
3 Exhibit "E".

4 11. Had the Notice of Appeal merely been lodged, rather
5 than filed, or if it had been rejected as untimely or because the
6 filing fee was unpaid, I would have separately requested an
7 extension of time, pursuant to Rule 802(c), before making another
8 attempt to file the Notice of Appeal.

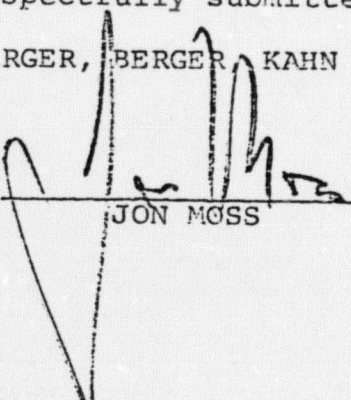
9 12. The Neilson memo, however, led me to believe that
10 my request to Judge Galgay had resulted in a valid filing, sub-
11 ject to the payment of the \$10.00 filing fee. It was believed
12 that, upon the prompt payment thereof, the appeal would proceed
13 in the normal course. Accordingly, on August 20, 1976, I mailed
14 for filing Appellants' Designation of Record and Issues on
15 Appeal. A copy of my transmittal letter is attached hereto as
16 Exhibit "F". The filing stamp thereon indicates a filing date
17 of August 24, 1976.

18 13. At all times during the 30-day period within which
19 a Notice of Appeal may be filed, I believed that my request to
20 the Judge had been acted upon, the Notice of Appeal filed, and
21 that all was in order.

22 Dated: September 17, 1976

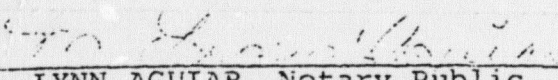
Respectfully submitted,

23 BERGER, BERGER, KAHN & SHAFTON

24
25 By 

JON MOSS

26
27 Sworn to before me this
28 17th day of September, 1976.

29 
30 M. LYNN AGUIAR, Notary Public

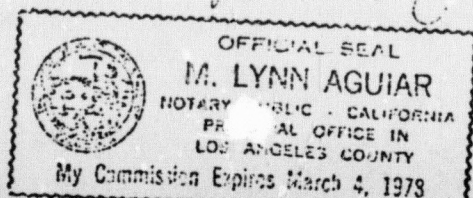


EXHIBIT A TO MOSS AFFIDAVIT - LETTER DATED
AUGUST 2, 1976 FROM JUDGE GALGAY'S SECRETARY
TO PLAINTIFFS' ATTORNEYS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
UNITED STATES COURTHOUSE
FOLEY SQUARE
NEW YORK, N. Y. 10007

JOHN J. GALGAY
BANKRUPTCY JUDGE

August 2, 1976

Wachtel, Lipton, Rosen & Katz, Esqs.
299 Park Avenue
New York, New York
Theodore Gewertz, Esq.

Paul S. Berger,
9454 Wilshire Boulevard
Beverly Hills, California
Paul S. Berger and John Moss

Weil, Gotshal & Manges, Esqs
767 Fifth Avenue
New York, New York
Richard P. Krasnow, Esq.

Finley, Kumble, Wagner, Heine, Underberg & Grutman, Esqs.
477 Madison Avenue
New York, New York

Alter, Lefevre, Raphael, Lowry & Gould, Esqs.
530 Fifth Avenue
New York, New York
Dirk S. Gould, Esq.

Re: W. T. GRANT COMPANY
No. 75 B 1735
Landlords Class Action

Gentlemen:

The Court has entered an opinion regarding the above.

It is "So Ordered". A copy of the opinion may be obtained
in the Clerk's Office, Room 230.

Very truly yours,

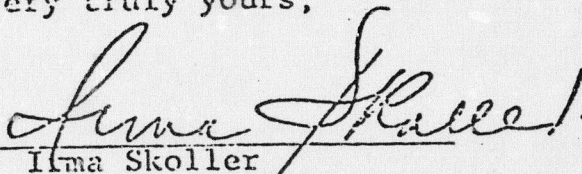

Irma Skoller
Secretary

EXHIBIT B TO MOSS AFFIDAVIT - LAST PAGE OF
OPINION OF JUDGE GALGAY

-15-

vacation and surrender of the various leased premises to be without merit. No provision of the Bankruptcy Act or the Rules requires a debtor to consult with a creditor regarding the latter's legal position and offer affirmative advice. The informational duties imposed on a debtor by Rule 212 (3) and made applicable to Chapter XI by Rule 11-33 are limited to the furnishing of "information concerning the estate and its administration when reasonably requested by a party in interest....". A request for legal advice is not within the purview of this provision.

By reason of the foregoing, the complaint is hereby dismissed for failure to state a claim against Grant upon which relief may be granted, except that plaintiffs Berger and Lee are entitled to have their lease with Grant rejected.

IT IS SO ORDERED, and counsel for Grant will submit an appropriate order rejecting said lease.

DATED: New York, New York
July , 1976

JOHN. J. GALGAY
Bankruptcy Judge

EXHIBIT C TO MOSS AFFIDAVIT - NOTICE OF APPEAL
TO DISTRICT COURT

BERGER, BERGER, KAHN & SHAFTON
9454 Wilshire Boulevard
Suite 410
Beverly Hills, California 90212

(213) 273-8380

ALTER, LefEVRE, RAPHAEL, LOWRY
& GOULD
530 Fifth Avenue
New York, New York 10036

Attorneys for Plaintiffs and Appellants

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

In re:	)	BANKRUPTCY: 75-B-1735
	)	
W.T. GRANT COMPANY,	)	NOTICE OF APPEAL TO DISTRICT
	)	COURT.
Bankrupt,	)	
	)	
PAUL S. BERGER, Trustee	)	
and RONALD M. LEE, in-	)	
dividually and on behalf	)	
of all others similarly	)	
situated, and SUTRO MORT-	)	
GAGE INVESTMENT TRUST,	)	
	)	
Appellants,	)	
	)	
vs.	)	
	)	
W.T. GRANT COMPANY,	)	
	)	
Appellee.	)	

PAUL S. BERGER, Trustee and RONALD M. LEE, in-
dividually and on behalf of all others similarly situated, and
SUTRO MORTGAGE INVESTMENT TRUST, Plaintiffs herein, hereby Appeal
to the United States District Court for the Southern District of
New York from the Order of the Honorable JOHN J. GALGAY, Bankruptcy
Judge, entered in this action on or about August 2, 1976, dismissing

the Complaint herein for failure to state a claim against GRANT upon which relief may be granted.

Plaintiffs also hereby appeal the Order of the Honorable John J. Galgay, Bankruptcy Judge, entered March 16, 1976, pursuant to Nunc Pro Tunc Order dated June 8, 1976, denying Plaintiffs' Motion for Bond, and Plaintiffs' Notice of Appeal from said Order and Designation of Records and Issues on Appeal, both dated March 23, 1976.

Parties to the Orders appealed from and the names and addresses of their respective attorneys are as follows:

Plaintiffs:

BERGER, BERGER, KAHN & SHAFTON
9454 Wilshire Boulevard
Suite 410
Beverly Hills, California 90212

(213) 273-8380

ALTER, LEFEVRE, RAPHAEL, LOWRY
& GOULD
530 Fifth Avenue
New York, New York 10036

(212) 687-4426

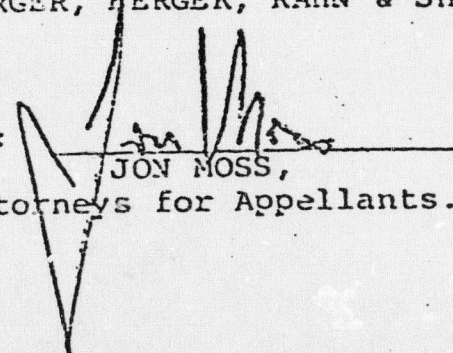
Defendant:

WACHTELL, LIPTON, ROSEN & KATZ
299 Park Avenue
New York, New York 10017

(212) 371-9200

DATED: AUGUST 11, 1976

BERGER, BERGER, KAHN & SHAFTON

By: 

JON MOSS,

Attorneys for Appellants.

EXHIBIT D TO MOSS AFFIDAVIT - LETTER DATED
AUGUST 11, 1976 FROM MOSS TO JUDGE GALGAY

WILLIAM BERGER (1903-1974)
PHIL S. BERGER
CHARLES H. KAHN
JOHN HUGHES MOSS
ARTHUR E. SHAFTON
PAUL FISLER
HARVEY L. BENSON
CHRIS ANN MAXWELL

BERGER, BERGER & KAHN
3454 WILSON BLVD.
BEVERLY HILLS, CALIFORNIA 90210

August 11, 1976

FILED

AUG 16 1976

JOHN J. GALGAY
District Judge

Judge John J. Galgay
United States District Court
Southern District of New York
United States Courthouse
Foley Square
New York, New York 10007

Re: W. T. GRANT COMPANY
Case No: 75-B-1735

Dear Judge Galgay:

Please find enclosed for filing, Plaintiffs' and Appellants Notice of Appeal to District Court.

Kindly file this document and stamp this letter with your filing date stamp and return same to the undersigned in the enclosed, pre-stamped envelope.

Thank you for your cooperation.

Very truly yours,

JON MOSS for
Berger, Berger, Kahn & Shafton

JM:rts
Enclosures

cc: Dirk S. Gould

EXHIBIT "D"

Gentlemen:

This is to advise you that your Notice of Appeal has been received by our office. It is appealing an order docketed on 7/29/76, therefore the filing of this appeal is late.

Also, there is a \$10.00 filing fee to be paid by certified check or money order to Clerk of Court.

Your appeal has been docketed on 8/16/76 and sent in to Judge Galgay's Secretary. Copy of your appeal has been mailed to attorney for Ruskamp.

ENCLOSED IS NOTICE OF HANDWRITING RULE 806.

Carlton R. [Signature]

EXHIBIT E TO MOSS AFFIDAVIT - LETTER DATED
AUGUST 19, 1976 FROM PAUL S. BERGER, ESQ. TO
JUDGE GALGAY

LAW OFFICES

BERGER, BERGER, KAHN & SHAFTON

9454 WILSHIRE BOULEVARD
BEVERLY HILLS, CALIFORNIA 90212

AREA CODE 213
272-0100
272-0855

WILLIAM BERGER (1903-1974)
PAUL S. BERGER
CHARLES H. KAHN
JOHN ROGER MOSS
ANTHONY E. SHAFTON
PAUL FISLER
CHRIST ANN MAXWELL

August 19, 1976

Judge John J. Galgay
United States District Court
Southern District of New York
United States Courthouse
Foley Square
New York, New York 10007

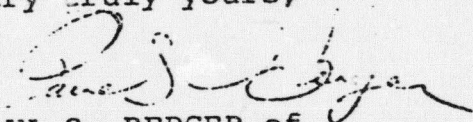
Re: W. T. GRANT COMPANY
Case No: 75-B-1735

Dear Clerk:

Pursuant to the enclosed copy of your notification, attached is Certified Check in the sum of \$10.00 covering the filing of the Notice of Appeal in the above entitled action.

Thank you for your cooperation.

Very truly yours,


PAUL S. BERGER of
Berger, Berger, Kahn & Shafton

PSB:rts
Enclosure

EXHIBIT F TO MOSS AFFIDAVIT - LETTER DATED
AUGUST 20, 1976 FROM MOSS TO JUDGE GALGAY

LAW OFFICES

BERGER, BERGER, KAHN & SHAFTON

9454 WILSHIRE BOULEVARD

BEVERLY HILLS, CALIFORNIA 90212

AREA CODE 213
273-8345
272-1006

WILLIAM BERGER (1903-1974)
PAUL S. BERGER
CHARLES H. KAHN
JOHN ROGER MOSS
ANTHONY E. SHAFTON
PAUL FISLER
CHRIS ANN MAXWELL

August 20, 1976

Judge John J. Galgay
United States District Court
Southern District of New York
United States Courthouse
Foley Square
New York, New York 10007

RE: W.T. GRANT COMPANY
Case No. 75-B-1735

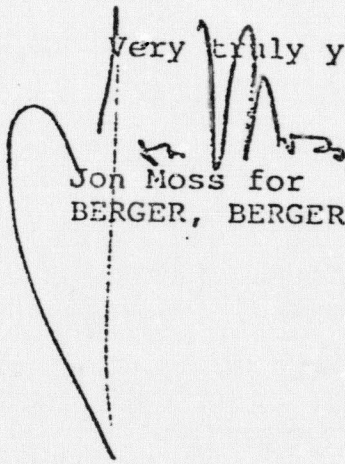
Dear Judge Galgay:

Please find enclosed for filing Appellants'
Designation of Record and Issues on Appeal.

Kindly file this document and stamp this letter
with your filing date stamp and return same to the undersigned
in the enclosed, pre-stamped envelope.

Thank you for your cooperation.

Very truly yours,


John Moss for
BERGER, BERGER, KAHN & SHAFTON

JM/dbb
enclosure

AFFIDAVIT OF THEODORE GEWERTZ, ESQ., FOR DEFENDANT, IN OPPOSITION TO MOTION FOR RECONSIDERATION AND REHEARING

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x	
In re	: In Bankruptcy
W. T. GRANT COMPANY,	: No. 75 B 1735
	:
Bankrupt,	: AFFIDAVIT IN OPPOSITION
PAUL S. BERGER, Trustee, and RONALD M. LEE and SUTRO MORTGAGE INVESTMENT TRUST, individually and on behalf of all others similarly situated,	: TO MOTION FOR REHEARING
	: OF DENIAL OF MOTION FOR
	: "EXTENSION OF TIME" TO
	: FILE NOTICE OF APPEAL
	:
Plaintiffs,	:
	:
-against-	:
	:
CHARLES G. RODMAN, Trustee in Bankruptcy of W. T. GRANT COMPANY, Bankrupt,	:
	:
Defendant.	:
	:
----- x	

STATE OF NEW YORK)
 : ss.:
COUNTY OF NEW YORK)

THEODORE GEWERTZ, being duly sworn, deposes and says that he is a member of the firm of Wachtell, Lipton, Rosen & Katz, special counsel for Charles G. Rodman, Trustee in Bankruptcy of W. T. Grant Company ("Grant"), Bankrupt, the defendant in the above-entitled purported adversary proceeding (the "Trustee"), and is fully familiar with the facts set forth herein.

1. This affidavit is submitted in opposition to plaintiffs' motion which seeks to have this Court rehear plaintiffs' previous motion for an "extension" of plaintiffs' time to appeal from the order of this Court entered on July 29, 1976 granting the Trustee summary judgment dismissing the amended complaint herein, and upon such rehearing, to grant the extension motion.

As shown below, this latest motion by plaintiffs is patently without merit and must be denied.

2. The basis of the present motion is supposed "additional facts and evidence not previously brought to the attention of the Court." (Gould Affidavit, pp. 1-2). Such supposed additional facts are stated to be the enclosure letter of plaintiffs' California counsel to this Court dated August 11, 1976 -- two days after the expiration of the ten-day period to file a notice of appeal provided for by Bankruptcy Rule 802(a). As quoted in plaintiffs' affidavit, the body of that letter reads as follows:

Please find enclosed for filing, Plaintiffs-Appellants Notice of Appeal to District Court.

Kindly file this document and stamp this letter with your filing date stamp and return same to the undersigned in the enclosed, pre-stamped envelope.

Thank you for your cooperation.

Plaintiffs claim that such letter was a "request to extend the time for filing a Notice of Appeal" within the meaning of Bankruptcy Rule 802(c), and upon that basis seek rehearing and vacation of the order denying their previous motion for an "extension". Such claim is utterly without foundation.

3. Preliminarily, it should be noted that such letter can hardly be claimed to satisfy the requirement of Rule 60(b)(2) of the Federal Rules of Civil Procedure which allows a court to relieve a party from a judgment or order if there is shown "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)". Plaintiffs' counsel was obviously aware of his own letter when

the original motion for an "extension" was made. The letter in question could easily have been raised upon the prior motion. Thus, quite apart from the merits of the instant motion, there is a serious question as to whether the prior motion can be "re-heard" or whether relief from the order denying the prior motion can even be sought on the basis of the supposed "additional facts and evidence" set forth by plaintiffs' counsel on the present motion.

4. More importantly, the text of such letter admits of no interpretation -- however strained -- that it is a request to extend plaintiffs' time to file their notice of appeal. The only "request" in the letter is a request to file the notice of appeal, to stamp the letter and to return it to plaintiffs' counsel. There is not one word in the letter requesting any extension. Indeed, a request for extension could not even have been plaintiffs' counsel's secret unexpressed intention in writing such letter. Thus, in plaintiffs' counsel's affidavit to the District Court submitted in opposition to the Trustee's motion to dismiss the appeal, plaintiffs' counsel claimed that he was not even aware that the 10-day period had expired when he mailed the notice of appeal which accompanied the letter (see Moss Affidavit of September 2, 1976, p. 5).

5. Plaintiffs' argument that plaintiffs' counsel's letter was a request to extend plaintiffs' time to file their notice of appeal within Bankruptcy Rule 802(c) is fatally defective in yet another important respect. Rule 802(c) requires that any request for an extension of time to file a notice of appeal made after expiration of the 10-day period provided for by Rule

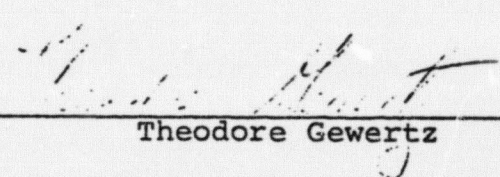
802(a) can only be granted upon a showing of "excusable neglect". Since the letter in question was admittedly not sent until after the expiration of the 10-day period, a showing of excusable neglect was required. Even if, by some stroke of judicial magic, plaintiffs' counsel's August 11, 1976 letter could be transformed into a "request", by no stretch of any imagination can it be said that such letter contains a showing of excusable neglect or even an attempt to make such a showing. Thus, the letter cannot be held to satisfy Rule 802(c).

6. Plaintiffs, in their desperation, seek to convert the fact that the notice of appeal was docketed, albeit with a notation that it was filed late, into "proof" that their "request" for an extension of time had been granted. See Moss Affidavit, pp. 3-4. Such "argument" proves too much. If, in fact, the filing of the late notice was a grant of a motion for extension, there would be no need for the instant motion. In that event, the "argument" should more properly have been made to the District Court in opposition to the Trustee's motion to dismiss the appeal. Not surprisingly however, no such "argument" was made by plaintiffs to the District Court, it being a hastily conceived afterthought of counsel.

7. Finally, plaintiffs' motives in making the instant motion are suspect. By virtue of the operation of Rule 802(b), the making of a motion pursuant to Rule 923 terminated the running of the time for plaintiffs to appeal this Court's order of September 14, 1976 denying plaintiffs' first "extension" motion. Under Rule 802(b) plaintiffs' time to appeal from the September 14, 1976 order will not run until the entry of the order denying the

instant motion. The extension of time gained by plaintiffs will perhaps enable them to avoid having their appeal from the September 14, 1976 order come before District Judge Duffy, who, at plaintiffs' request, on September 14, 1976 adjourned to October 5, 1976 the Trustee's motion to dismiss the appeal from the order and judgment dismissing this action, based upon plaintiffs' counsel's representation that the hearing on the motion to dismiss should await the appeal from the September 14, 1976 order of this Court. In view of Judge Duffy's observations on September 14, 1976 as to the decision dismissing this action, it is understandable that plaintiffs desire to avoid having Judge Duffy hear their appeal from the September 14, 1976 order. Plaintiffs' attempt to use the present motion as an indirect method of "judge shopping" should not be condoned by this Court.

WHEREFORE, your deponent respectfully requests that plaintiffs' motion be denied in all respects.


Theodore Gewertz

Sworn to before this
27th day of September, 1976.


Notary Public

MARGARET L. MAC KICHUE
Notary Public, State of New York
No. 24-4414373
Qualified in Kings County
Commission Expires March 30, 1977

TRANSCRIPT OF HEARING HELD SEPTEMBER 28, 1976 ON
MOTION FOR REARGUMENT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
(In Bankruptcy)

In the Matter
of

W. T. GRANT COMPANY,

Bankrupt.

No. 75 B 1735

U. S. Courthouse,
Foley Square,
New York, New York.

September 28, 1976.

OSC (Paul S. Berger)

B E F O R E :

HON. JOHN J. GALGAY,

Bankruptcy Judge

Decision Reserved.

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A P P E A R A N C E S :

WACHTELL, LIPTON, ROSEN & KATZ, ESQS.,
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299 Park Avenue,
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BY: THEODORE GEWERTZ, ESQ.,
of Counsel.

ALTER, LEFEVRE, RAPHAEL, LOWRY & GOULD, ESQS.,
Attorneys for Paul S. Berger et al.,
530 Fifth Avenue,
New York, New York.

BY: DIRK S. GOULD, ESQ.,
of Counsel.

WEIL, GOTSHAL & MANGES, ESQS.,
Attorneys for Trustee,
767 Fifth Avenue,
New York, New York.

BY: DAVID CIMINESI, ESQ.,
of Counsel.

- - -

P R O C E E D I N G S

THE JUDGE: What happened on
Berger and Lee?

MR. GOULD: Your Honor made an
order on September 14th which denied the
plaintiff appellant's application for an
extension of time pursuant to Bankruptcy
Rule 802-C.

Your Honor found that although

Grant

there was justifiable neglect in the application that we made, that the court was without power to grant the extension in view of the fact that a request had not been made within the twenty day period of maximum extension permitted under Rule 802-C, although in fact the notice of appeal had been filed on August 16th, which is within that twenty day period of time.

Now, this, of course, is a motion for reargument. We would like to point out to the court certain facts which were not presented at the initial argument on September 14th.

The notice of appeal should have been filed on August 9th. That is the last day as of right under Rule 802-A to be filed.

The order to which the appeal is addressed was entered on July 29, 1976.

On August 2nd, your secretary, Miss Skoler sent out a letter to counsel

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3 for all parties stating that an order
4 had been entered in the above matter.

5 That letter was not received by
6 New York counsel for the plaintiffs until
7 August 5th. It was not received by California
8 counsel, which is counsel of record, until
9 August 9th.

10 On August 5th New York counsel
11 obtained a copy of the order from the
12 court records and mailed it out to California
13 and the order was not received there un-
14 til August 9th.

15 Again, August 9th was the last
16 day to file the notice of appeal as of
17 right. There was a seven day lapse from
18 the time the order was entered until counsel
19 had actually received written notice that
20 the order had been entered.

21 As I mentioned, the court had made
22 a finding on September 9th that under
23 Rule 802-C it was precluded from grant-
24 ing any extension because the court in-
25 terpretation of that rule was the request

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3 had to be made within the twenty day period
4 of time.

5 We, of course, had argued that
6 that is not the case under Rule 902-C.
7 902-C refers only to the maximum period
8 of time of extension and not when the re-
9 quest for time must be made.

10 But nevertheless, we on this motion
11 would like to point out that on August 11th,
12 two days after the time to appeal as of
13 right had expired, Mr. Moss from the California
14 firm of Berger, Berger, Kahn & Sharfman
15 had sent to you, your Honor, a letter
16 reading:

17 "Please find enclosed for filing
18 plaintiff's and appellant's notice of
19 appeal to the District Court. Kindly file
20 this document and stamp this letter with
21 your filing date stamp and return same
22 to the undersigned in the enclosed pre-
23 stamped envelope. Thank you for your
24 cooperation."

25 This was not sent to the clerk.

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3 It was not taken or hand-delivered to
4 the clerk; it was sent to you directly.

5 Presumably you or your office
6 directed that the notice of appeal be
7 filed. Of course, I am not familiar with
8 the internal workings of your office.

9 THE JUDGE: Do my initials appear
10 on that at all?

11 MR. GOULD: The letter bears the
12 stamp "Filed August 16, John J. Galgay,
13 Bankruptcy Judge." That is the only thing
14 that appears on here, your Honor.

15 Now, this same letter dated
16 August 11th --

17 THE JUDGE: My question is do my
18 handwritten initials appear on there?

19 MR. GOULD: I don't believe so,
20 your Honor. On August 16th the notice
21 of appeal was filed and the letter of
22 August 11th was returned to the sender
23 with the advice that "This is to advise
24 you that your notice of appeal had been
25 received by our office. It is appealing

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an order documented on 7/29/76. Therefore the filing of this appeal is late.

"Also there is a \$10 filing fee to be paid by certified check or money order to Clerk of Court.

"Your appeal has been docketed on August 16, 1976 and sent in to Judge Galgay's secretary. A copy of your appeal has been mailed to attorney for the bankrupt.

"Enclosed is notice of Bankruptcy Rule 806," and purports to be the signature of Evelyn Neilsen. I don't know who Evelyn Neilsen is or what office she works in.

Mr. Moss in his affidavit which is submitted on this motion states that he believed that the filing of the notice of appeal had -- was in fact a valid filing. In fact, if the --

MR. CIMINESI: What does Moss have to do with this motion, it is your affidavit.

MR. GOULD: No, there is a

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3 supplemental affidavit attached to it,
4 I believe, referred to in the order to
5 show cause. It is also attached -- it
6 follows mine.

7 MR. GEWERTZ: Where did you hide it?

8 MR. GOULD: It is not hidden, it
9 is right in the back, Mr. Gewertz.

10 MR. GEWERTZ: After all the exhibits.

11 MR. GOULD: Mr. Moss points out
12 that had the notice of appeal been re-
13 jected then, of course, there would have
14 been ample time for him to have made an
15 application within the twenty day period
16 of time because that additional twenty
17 day period of time would not have expired
18 until August 29th.

19 Your Honor, we believe that the
20 letter having been sent after the time to
21 appeal had expired as of right is in ef-
22 fect tantamount in effect to a request
23 for the extension of time.

24 Mr. Gewertz in his papers points
25 out that the letter does not say please

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3 grant us a request for an extension of
4 time and that is quite so. But we feel
5 that under Rule 802-C a formal motion
6 certainly does not have to be made and
7 I believe I pointed out a reference to
8 that in Colliers.

9 All that is sufficient is that a
10 request be made. That request can be
11 granted ex parte, without any formal notice
12 of motion or without any hearing. There
13 is a distinction between Rule 802-C and
14 Rule 4-A of the Federal Rules of Appellate
15 Procedure.

16 It is also entirely possible that
17 the court could be construed as having
18 granted that request for the filing and
19 we believe in the interests of justice
20 that on reargument the court should find
21 that the request for extension of time was
22 made within the twenty day period of time
23 and accordingly grant the extension of
24 time to file this notice of appeal to
25 August 16, 1976, which was the date that

Grant

the appeal was actually filed.

In the alternative, your Honor, we offer the court the alternative again, in the interests of justice, to see that equity is done, that the court vacate its original order dated -- I believe it is dated July 26th but it was entered on July 29, 1976, which dismissed the complaint and have it re-entered so that a timely appeal can be taken from that order.

Thank you, sir.

THE JUDGE: Thank you very much.

MR. GEWERTZ: If your Honor recalls, we were before you two weeks ago and your Honor ruled that you had no power to grant the extension which was then retroactively sought. It was on the 41st day after the entry of the order appealed from.

Now, this is deemed a motion to reargue, the prior motion of the extension, retroactive extension, I should add and alternatively to vacate that order.

Crant

Now, the sole basis which I have heard and which is in the papers of plaintiff's here is this closure letter which California counsel sent enclosing to your Honor the notice of appeal and asking that it be filed.

Now, to me that doesn't represent any new evidence. This is material which certainly counsel was aware of when the prior extension of two weeks ago. It certainly should have been raised then.

I don't think it supports a motion to vacate an order based on null discovered evidence which wasn't previously available. But preliminarily, I want to put that aside. I want to get to the heart of the thing.

The letter itself counsel has read it, you can search up and down. There is nothing in there requesting an extension of time to file an appeal. It was merely a request, here, Judge, here is my notice of appeal. Please file it.

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There is nothing --

THE JUDGE: What do you have to say about counsel's suggestion that I withdraw my opinion and order dated July 29th and give him -- refile it and give him an opportunity to make a timely appeal?

MR. GEWERTZ: I don't think that would be proper. I don't think you would have jurisdiction.

The matter is up before the District Court right now. I moved to dismiss the appeal. I think this smells.

I might say the matter was up on the calendar in the District Court two weeks ago. Counsel came in, after your Honor heard the extension motion, came in to Judge Duffy and said, well, I want an adjournment of this motion to dismiss the appeal because I want to have our appeal from Judge Galgay's order of this morning heard at the same time.

Judge Duffy said, okay, you can have that extension.

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3 Now, what happens they come in and
4 make a motion for reargument, meaning
5 that the original appeal from your Honor's
6 order of the 14th won't even get up to
7 Judge Duffy next week.

8 I don't think it possibly can
9 unless some expedited steps are taken.
10 So what we see now as subterfuge is to
11 ask for this additional relief.

12 The matter is before the District
13 Court and I don't think there is any power
14 here to do that.

15 THE JUDGE: You must admit that
16 he is resourceful.

17 MR. GEWERTZ: Well, that could be.
18 Not all resourcefulness though is rewarded.

19 THE JUDGE: Well, the basic question
20 is really whether or not I have authority
21 now that the matter is in the District
22 Court.

23 MR. GEWERTZ: Well, getting beyond
24 that, whether or not you should exercise
25 that authority. I don't think under these

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circumstances it would be proper.

Let me just finish on the merits of this particular argument. Obviously it is not a request -- it is a request and I admit the rules talk of a request rather than a motion.

Fine, but they have to go beyond that. There has to be a request for extension. There is nothing in that letter which indicates that counsel thought that he was late or asking for an extension.

As for the suggestion that it could be construed as a request for an extension and a granting of the request for extension, if that were so, we wouldn't have to be here this morning.

Counsel could argue that to the District Court. In other words, he would be in a position of saying that your Honor did grant an extension and then I would have to argue to the District Court that your Honor didn't and the appeal was not timely filed.

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But even going beyond that, assume it is a question, 802-C says that if the request is made after the ten day period, it has to be accompanied by a showing of excusable neglect.

You can look at that letter. There is no showing of excusable neglect. There is no attempt to even show excusable neglect in that letter. So obviously it can't be construed as counsel would have this court construe it.

That I think should end the matter. The matter should be heard, it's up before the District Court.

THE JUDGE: I will study the papers.

MR. GOULD: May I make a response to the question that you raised?

THE JUDGE: Yes.

MR. GOULD: Under Rule 60-B, subdivision 6, I believe your Honor has the right to vacate the original order of this court and have it re-entered. I believe

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3 that Rule 60-B reads, "Upon such terms
4 as are just a court may relieve a party
5 or his legal representative from a final
6 judgment order," etc., etc.

7 Subdivision 6 reads, "Any other
8 reason justifying relief from the opera-
9 tion of the judgment."

10 Now, I believe also the court
11 has inherent power to vacate its own judg-
12 ment or its own order. Also with respect
13 to the other question that your Honor
14 raised, now that the matter is up before
15 Judge Duffy -- of course, if you vacate
16 the original order that was entered on
17 July 29th, the rest of this becomes moot,
18 but if your Honor would indicate a will-
19 ingness to grant the application for the
20 extension, the matter could be remanded
21 by Judge Duffy to your Honor for that
22 ruling.

23 THE JUDGE: Well, I just have the
24 feeling that any time an appeal is taken
25 from an order, everything goes to the

Grant

District Court and I am without power until they act.

MR. GOULD: Yes, but as I say there is procedure for remand back to your Honor for ruling. That, of course, as I say, is without --

THE JUDGE: When are you supposed to appear before Judge Duffy again?

MR. GEWERTZ: Next week.

MR. GOULD: On October 5th.

Let me just make a statement with respect to that.

Mr. Gewertz in his papers suggested that we may be just shopping. Now, nothing could be further from the truth. As a matter of fact, what we -- of course, if your Honor rules in our favor on this motion it may not be necessary to proceed further, but we are prepared to have Judge Duffy hear on both the motion that the defendant has brought to dismiss the appeal and any appeal from your order, even if it goes beyond October 5th.

Grant

We just want the right to have a judicial review of the -- to have our day in court, so to speak.

THE JUDGE: I have marked this sub judice. I will try to have it tomorrow and communicate with my chambers before the end of the day.

MR. GEWERTZ: On this suggestion that the order be vacated and then re-entered, if that were the procedure to be adopted, there would be no finality whatsoever of any order.

There would be no -- people could wait forever if they decide to appeal. They would come in and say, well, vacate your order, re-enter it anew because I feel like appealing.

I don't think the rules contemplate it.

THE JUDGE: He is arguing he thinks an injustice has been done.

MR. GOULD: That is the reason for having a Rule 60-B.

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THE JUDGE: I will take it under
advisement.

MR. GOULD: Thank you, your
Honor.

- - -

ORDER AND MEMORANDUM DECISION OF JUDGE GALGAY
ON MOTION FOR REARGUMENT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x	
In The Matter	:
-Of-	:
W. T. GRANT COMPANY,	:
	:
Debtor,	:
	:
PAUL S. BERGER, Trustee, and	:
RONALD M. LEE, individually and	:
on behalf of all others similarly	:
situated,	:
Plaintiffs,	:
	:
W. T. GRANT COMPANY,	:
	:
Defendant.	:
	:
----- x	

No. 75 B 1735

MEMORANDUM OPINION

JOHN J. GALGAY - Bankruptcy Judge

Plaintiffs in this class action seek reconsideration of the Court's order of September 14, 1976 denying plaintiffs' application for an extension of time to file notice of an appeal from an order and decision entered July 29, 1976 dismissing the class action for failure to state a claim against the debtor upon which relief could be granted. In the alternative, plaintiffs request an order vacating the July 29th decision.

Plaintiffs base their right to a reconsideration on Bankruptcy Rules 923 and 924 which make Rules 59 and 60 of the Federal Rules of Civil procedure applicable to bankruptcy cases.

The facts are not in dispute. Notice of the July 29th order was sent to plaintiffs' counsel in both New York and Cali-

fornia. New York counsel received said notice on August 2nd and California counsel received it on August 9th, the last day on which notice of an appeal to the order of July 29th could be filed pursuant to Rule 802(a) of the Bankruptcy Rules.

California counsel mailed a notice of appeal on August 11th which was filed and docketed by the Clerk's Office on August 16th. A letter was sent to counsel stating that the notice was not timely filed. By an order to show cause dated September 8th, plaintiffs sought an extension of time pursuant to Rule 802(c) for filing notice of the appeal. A hearing was held on September 14th at which time plaintiffs' motion was denied on the grounds that Rule 802 sets an outer limit of 30 days following entry of an order or judgment by which time notice of an appeal must be filed. Assuming excusable neglect, request for an extension beyond the initial ten-day period must also be made within the thirty-day limit. Therefore this Court was without power to consider a request for extension of the ten-day appeal period at any point after August 29th.

Plaintiffs now assert that there are additional facts and evidence not brought to the attention of the Court during the September 14th proceeding. This claim is based on a letter written by California counsel dated August 11th which accompanied the late notice of appeal.

The body of the letter reads as follows:

"Please find enclosed for filing, Plaintiffs-Appellants' Notice of Appeal to the District Court.

Kindly file this document and stamp this letter with your filing date stamp and return same to the undersigned in the enclosed, pre-stamped envelope.

Thank you for your cooperation."

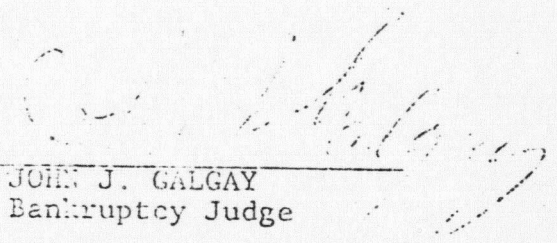
Plaintiffs contend that this letter constitutes a request to extend the filing time for notice of an appeal beyond the ten-day period set in Rule 802(a). That position is clearly unsupportable.

Although special counsel for the trustee did not challenge plaintiffs' request for a rehearing, there is substantial doubt as to whether the letter of August 11th is newly discovered evidence of the type which would warrant relief under either Rule 59 or Rule 60(b)(2) of the Federal Rules of Civil Procedure. The requirements under both rules are generally the same, 7 Moore's Federal Practice, ¶60.23[4] (2nd ed. 1975). Both Rule 59 and Rule 60(b)(2) contemplate evidence not known to the movant at the time of trial and, furthermore:

... the movant must have been excusably ignorant of the facts, i.e., the evidence must be such that it was not discoverable by diligent search. A party who has failed to evaluate evidence properly and thereby failed to submit it at trial, or a party who desires to present his case under a different theory in which facts available at the original trial now first become important will not be granted a new trial. 6A Moore's Federal Practice, ¶59.08[3] (2nd ed. 1975). (footnotes omitted).

It is hard to imagine how counsel's own letter was not discoverable when the original motion for an extension was made. More importantly, no interpretation of California counsel's letter would permit the reader to conclude that plaintiff was requesting an extension. Counsel admits that it believed that the ten-day period had not yet expired when it sent the late notice of appeal along with the letter in question. Believing as it did, counsel would not have requested an extension. Rather, the motion for rehearing and reconsideration merely represents an attempt by plaintiffs to introduce a new theory by which their notice of appeal could be considered filed in a timely manner. Such a move at this late date cannot succeed.

WHEREFORE, plaintiffs' motion is denied in all respects.
SO ORDERED.


JOHN J. GALGAY
Bankruptcy Judge

DATED: NEW YORK, NEW YORK
October / , 1976

OPINION AND ORDER OF HON. IRVING BEN COOPER
APPEALED FROM

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x

In re :

W. T. GRANT COMPANY, :

Bankrupt, :

PAUL S. BERGER, Trustee, and RONALD M. :
LEE and SUTRO MORTGAGE INVESTMENT TRUST, :
individually and on behalf of all :
others similarly situated, :

Plaintiffs-Appellants, :

-against- :

CHARLES G. RODMAN, Trustee in Bank- :
ruptcy of W. T. GRANT COMPANY, :
Bankrupt, :

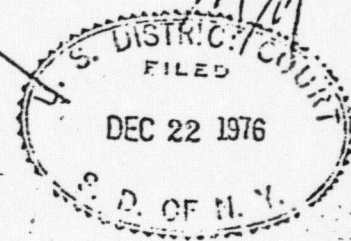
Defendant-Appellee. :

-----x

IRVING BEN COOPER, D.J.

We have before us three matters related to the bankrupt estate of W. T. Grant: first, a motion by defendant trustee Charles G. Rodman in behalf of the Estate of W. T. Grant Company, Bankrupt, to dismiss plaintiffs' appeal from an order of the Bankruptcy Court (Galgay, J.) dated July 26, 1976 and entered July 29, 1976; second, plaintiffs' appeal from Judge Galgay's order dated September 14, 1976 which denied their motion for a nunc pro tunc extension of time to file a notice of appeal from the aforementioned order of July 29th; and third, plaintiffs' appeal from Judge Galgay's order of October 1, 1976 which denied plaintiffs' motion for rehearing and reconsideration of the September 14th order.

MEMORANDUM
75 B 1735



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For the reasons set forth below, we are constrained to and do grant defendant's motion to dismiss plaintiffs' appeal, and we affirm the September 14 and October 1 orders of the Bankruptcy Court.

Plaintiffs Paul S. Berger, trustee and others¹ filed an amended complaint which was dismissed on defendant's motion for summary judgment for failure to state a claim. Judge Galgay's order, dated July 26, 1976, was duly entered and docketed by the clerk of the Bankruptcy Court on July 29, 1976. Notice of that order was mailed to both New York and California counsel appearing for plaintiffs. On August 5, New York counsel, Dirk S. Gould, Esq., received a copy of the order; California counsel, Berger, Berger, Kahn & Shafton, received its copy on August 9th. Upon receiving notification of the order, New York counsel secured a copy of Judge Galgay's opinion and promptly mailed it to their counterparts in California. Thereupon, California counsel mailed a notice of appeal dated August 11th which was duly filed by the clerk on August 16th. (Gould Affid., dated September 7, 1976, pp. 2-3) The bankruptcy clerk alerted plaintiffs' counsel that their notice of appeal was filed late. Notwithstanding this information, plaintiffs' counsel did nothing beyond paying the requisite fee.

complaint brought by the plaintiffs (landlords of premises formerly used by W. T. Grant Company for its store) is an uncertified class action alleging that the defendant abused his position as trustee and the powers of the Bankruptcy Court to unfairly terminate leases of the premises injurious to the plaintiffs' financial interests.

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On August 30, 1976, defendant moved in District Court (Part I) for an order dismissing plaintiffs' appeal as untimely taken. The hearing on that motion now before us was adjourned several times while plaintiffs moved the Bankruptcy Court for an order to extend the time for filing a notice of appeal. Upon being denied such requested relief by oral order of September 14, 1976, plaintiffs moved for a rehearing and reconsideration on the basis of new evidence. Judge Galgay denied that motion on October 1, 1976. The Bankruptcy Court's orders denying plaintiffs' motions for extension and reconsideration are now before us on timely appeal.

We turn first to defendant's motion to dismiss plaintiffs' appeal from Judge Galgay's order filed July 29th dismissing plaintiffs' amended complaint (the Dismissal Order). The principal issue is whether the filing of the notice of appeal on August 16, 18 days after the entry of the Dismissal Order, was timely.

Rule 801 of the Bankruptcy Rules provides in pertinent part:

An appeal from a judgment or order of a referee to a district court shall be taken by filing a notice of appeal with the referee within the time allowed by Rule 802.

Rule 802(a) states:

The notice of appeal shall be filed with the referee within 10 days of the date of entry of the judgment or order appealed from. (emphasis added)

Thus, the Bankruptcy Rules provide that appeals must be noticed within 10 days of entry of the judgment or order appealed from. There is a provision in the Rules, however, allowing for an extension of time over this 10 day period:

The referee may extend the time for filing the notice of appeal by any party for a period not to exceed 20 days from the expiration of the time otherwise prescribed by this rule. A request to extend the time for filing a notice of appeal must be made before such time has expired, except that a request made after the expiration of such time may be granted upon a showing of excusable neglect....
Rule 802(c)

Accordingly, an appeal from a Bankruptcy Judge's order must be filed within 10 days after the entry of that order, unless a request for an extension is made within the initial 10 day period in which case the appellant has 20 additional days to file the notice of appeal. If excusable neglect is shown, the request for an extension need not be made within 10 days of the filing of the bankruptcy order. However, assuming "excusable neglect," any request for an extension must be made within the 30 day period following entry of the judgment or order. The Advisory Committee's comment on Bankruptcy Rule 802(c) is clear on this point:

A request for an extension of the time for filing a notice of appeal from a referee's judgment or order not authorizing the sale of property may be filed after the expiration of the 10-day period following its entry ...but the extension may be granted on such a request only on a showing that the delay was due to excusable neglect. Moreover, any allowable extension cannot exceed the 20-day limitation prescribed by the first sentence of subdivision (c). Thus the maximum time allowable under this rule for filing an appeal is 30 days after the entry of an order or 30 days from the entry of an order disposing of a motion that terminates the running of the time for filing an appeal as provided in subdivision (b). (emphasis added)

Failure to timely file a notice of appeal is a jurisdictional defect. In re Great Western Ranches, Inc., 511 F.2d 1021, 1024 (9th Cir.1975). The Bankruptcy Rules clearly state that "unless a notice of appeal is filed as prescribed by Rules 801 and 802, the judgment or order of the referee shall become final." Rule 803. Thus, a reading of Rules 801 through 803 makes certain that if a notice of appeal or a request for an extension of time is not filed within 30 days of the judgment or order of the Bankruptcy Court, said order becomes final.

As indicated above, Judge Galgay's order dismissing plaintiffs' amended complaint was entered on July 29, 1976. The 10 day period for filing a notice of appeal, as

prescribed in Rule 802(a), began on July 30th and ended on August 9th. See Bankruptcy Rule 906(a) and Federal Rules of Civil Procedure, Rule 6(a). Plaintiffs' notice of appeal, dated August 11th, was not filed until August 16th -- 18 days after the entry of Judge Galgay's dismissal order. Clearly plaintiffs did not comply with the 10 day period of Rule 802(a). Further, no request for an extension of time to file a notice of appeal was made until September 8, 1976, 41 days after the dismissal order entry. Plainly, such a request for an extension was untimely. See Rule 802(c); Advisory Committee's comments, supra, p.5. Accordingly, defendant's motion to dismiss plaintiffs' appeal of Judge Galgay's order of July 29th as untimely is granted. See In re Butts, 123 F.2d 250, 251 (2d Cir. 1941).

We now consider plaintiffs' appeal from Judge Galgay's orders of September 14, 1976 and October 1, 1976 which respectively 1) denied plaintiffs' motion for a nunc pro tunc extension of time to file a notice of appeal from the July 29th dismissal order and 2) denied plaintiffs' motion for rehearing and reconsideration of the September 14th order.

On September 8, 1976, plaintiffs moved the Bankruptcy Court for an order extending the time to file its notice of appeal from Judge Galgay's July 29th order dismissing plaintiffs' amended complaint. This motion, 41 days after

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the entry of the dismissal order, was indisputably untimely. Rule 802(c); see discussion supra. For that reason Judge Galgay's oral order of September 14th denied plaintiffs' application. We affirm that decision.

As noted earlier, a party may request an extension of time to file a notice of appeal during the first 10 day period (Rule 802(c)) or within the 20 day period thereafter if the request is accompanied by a showing of excusable neglect. It is a fact that plaintiffs made no request for an extension during the first 10 day period. However, plaintiffs maintain that ~~their~~ letter dated August 11, 1976 (which accompanied the notice of appeal) "was tantamount to a request for an extension of time." (Pltf. Brief, p.2) Judge Galgay found that "no interpretation of ... counsel's letter would permit the reader to conclude that plaintiff was requesting an extension." Judge Galgay's opinion of October 1, 1976, p.4. We agree.

A careful examination of this letter clearly indicates that it was a request that the notice of appeal be filed, not a request for an extension of time to file that notice. In any event, Judge Galgay's factual determination that the August 11th letter was not an extension request may only be overturned if clearly erroneous. See Bankruptcy Rule 810. We hold that Judge Galgay's finding on this point was not clearly erroneous; therefore we will not set it aside.

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Since we do not construe the letter of August 11 from plaintiffs' counsel a request for an extension, it is otherwise undisputed that no extension request was recorded during the entire 30 day period following Judge Galgay's dismissal order of July 29th. Further, an analysis of plaintiffs' excusable neglect argument, or a review of Judge Galgay's finding of excusable neglect is unnecessary. Rule 803 makes this point beyond cavil:

Unless a notice of appeal is filed
as prescribed by Rules 801 and 802,
the judgment or order of the referee
shall become final.

Plaintiffs' argument for a nunc pro tunc extension by the expedient of vacating the July 29th dismissal order and reinstating it now, so that the time to file a notice of appeal would run anew, is unwarranted. Such action would give the Bankruptcy Court the potential power to revive an appeal at any time. Hodgson v. United Mine Workers of America, 473 F.2d 118, 124 (D.C. Cir. 1972). Rule 802(c) expresses the Congressional policy of curbing the inherent discretionary power some courts asserted in granting extensions of time for appeal after the original time had expired. See 13 Collier, Bankruptcy ¶802.03; see also Advisory Committee on Rules' Notes to Rule 77(d) of the Federal Rules of Civil Procedure. The nunc pro tunc device advocated by plaintiffs would undermine the finalty of orders and specifically contravene the intent of Rule 802(c). See Advisory Committee's Notes on Rule 802(c).

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Accordingly, Judge Galgay's order dated September 14, 1976 denying plaintiffs' motion for a nunc pro tunc extension of time to file a notice of appeal is affirmed.

Plaintiffs' also appeal from Judge Galgay's order of October 1, 1976 denying their motion for rehearing and reconsideration of the September 14, 1976 order. In support of their position, plaintiffs seek to characterize their counsel's letter of August 11th as "additional facts and evidence not previously brought to the attention" of the Bankruptcy Court. (Gould's Affid. of September 17th, p.2)

Federal Rules of Civil Procedure 60(b)(2), made applicable to bankruptcy matters by Bankruptcy Rules 923 and 924, allows a party to be relieved from an order where newly discovered evidence arises. "The evidence must be such as was not and could not by the exercise of diligence have been discovered in time to present in the original proceeding." 7 Moore's Federal Practice, ¶60.23[4] (2d ed. 1975). Rules 59 and 60(b)(2) of the Federal Rules contemplate evidence not known to the movant at the time of trial:

The movant must have been excusably ignorant of the facts, i.e., the evidence must be such that it was not discoverable by diligent search. A party who has failed to evaluate evidence properly and thereby failed to submit it at trial, or a party who desires to present his case under a different theory in which facts available at the original trial now first

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become important will not be granted a new trial. 6A Moore's Federal Practice, §59.08[3] (2d ed. 1975) (footnotes omitted)

We concur in Judge Galgay's determination that the very letter of August 11 from counsel for plaintiffs was not "newly discovered evidence." Accordingly, the order of the Bankruptcy Court of October 1, 1976 which denied plaintiffs' motion for rehearing and reconsideration of the September 14 order is affirmed.

Finally, a principle which underlies our determination of the issues above is our belief that the purpose of Bankruptcy Rules 801 through 803 is to expedite bankruptcy proceedings and give their orders finality. See 13 Collier on Bankruptcy, §803.03 (14th ed. 1943) These rules should be strictly construed. See In re Great Western Ranches, Inc., supra, at 1024; In re Butler's Tire and Battery Co., 8 Collier Bankr. Cas. 790 (D. Ore. May 11, 1976).

[B]ankruptcy proceedings are designed to be expeditious, and those charged with interpreting the Rules are enjoined to construe them to secure the expeditious and economical administration of every bankrupt estate and the just, speedy and inexpensive determination of every proceeding in bankruptcy. 13 Collier on Bankruptcy, §803.03

In furtherance of those ends, the time limitations explicit in Rules 801 and 802 must be strictly honored. It is plain that these provisions were violated in the case at bar. For this reason, we affirm Judge Galgay's order

entered July 29, 1976, dismissing plaintiffs' appeal as untimely; further, we affirm Judge Galgay's orders of September 14 and October 1 which denied plaintiffs' nunc pro tunc extension of time to file a notice of appeal and denied plaintiffs' motion for rehearing and reconsideration thereof.

SO ORDERED:

New York, New York
December 21, 1976

UNITED STATES DISTRICT JUDGE

NOTICE OF APPEAL

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

-----x
In Re:

W. T. GRANT COMPANY,

Bankrupt,

PAUL S. BERGER, Trustee, and
RONALD M. LEE and SUTRO MORTGAGE
INVESTMENT TRUST, individually and
on behalf of all others similarly
situated,

Plaintiffs-Appellants,

- against -

CHARLES G. RODMAN, Trustee in
Bankruptcy of W. T. GRANT COMPANY,
Bankrupt,

Defendant-Appellee.
-----x

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Filed:
U.S.D.C.
January 19-77
SDNY
BANKRUPTCY
CASE NO. 75-B-1735

NOTICE OF APPEAL

NOTICE is hereby given that Plaintiffs, PAUL S. BERGER, Trustee, and RONALD M. LEE, and SUTRO MORTGAGE INVESTMENT TRUST, individually and on behalf of all others similarly situated, above-named, hereby appeal to the United States Court of Appeals for the Second Circuit from the Memorandum Opinion and Order of the Honorable IRVING BEN COOPER, District Judge, dated the 21st day of December, 1976, and entered in this action on the 22nd day of December, 1976, which:

- i) granted Defendant's motion to dismiss Plaintiffs' appeal from the order of the Bankruptcy Court dated July 26, 1976 and entered July 29, 1976;

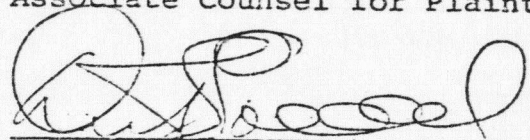
ii) affirmed the order of the Bankruptcy Court dated September 14, 1976, which denied Plaintiffs' motion for an extension of time to file a notice of appeal from the aforesaid order entered July 29, 1976, and

iii) affirmed the order of the Bankruptcy Court dated October 1, 1976, which denied Plaintiffs' motion for rehearing and reconsideration of the aforesaid order of September 14, 1976, and from each and every part of said order.

Dated: January 17, 1977

ALTER, LEFEVRE, RAPHAEL,
LOWRY & GOULD, P.C.
Associate Counsel for Plaintiffs

By:



DIRK S. GOULD, A Member of Firm

530 Fifth Avenue
New York, New York 10036
(212) 637-4426

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss .

ROBERT BISOLKO, being duly sworn,
deposes and says that deponent is not a party to the action,
is over 18 years of age and resides at 123 1/2 CHRISTIE ST
NEW YORK, N.Y.

That on the 21 day of MARCH, 1977,
deponent personally served the within APPENDIX

upon the attorneys designated below who represent the
indicated parties in this action and at the addresses below
stated which are those that have been designated by said
attorneys for that purpose.

By leaving 1 true copies of same with a duly
authorized person at their designated office.

~~By depositing _____ true copies of same enclosed~~
~~in a postpaid properly addressed wrapper, in the post office~~
~~or official depository under the exclusive care and custody~~
~~of the United States post office department within the State~~
~~of New York.~~

Names of attorneys served, together with the names
of the clients represented and the attorneys' designated
addresses

WACHTELL, LIPTON ROSEN & KATZ
ATTORNEYS FOR DEFENDANT-APPELLEE
299 PARK AVE.
NEW YORK, N.Y. 10017

Robert Bisolko

Sworn to before me this

21st day of March, 1977
Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Bronx County
Commission Expires March 30, 1978 77